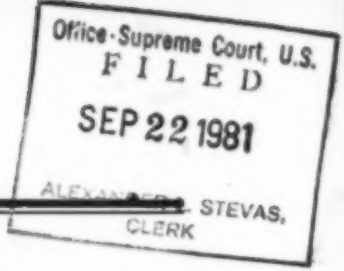
Petition

81-584



No. A-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORECK CORPORATION, *Petitioner,*

v.

WHIRLPOOL CORPORATION,

and

SEARS, ROEBUCK & COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 22, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether, in this antitrust conspiracy case, the court of appeals, in overruling the district court's finding that there was sufficient evidence of conspiracy to submit to the jury, erred by failing to follow established precedents of this Court and lower courts that the conspiracy issue may not be taken from the jury where there is evidence, including evidence of anticompetitive motive and actions contrary to economic self-interest, from which a jury could have inferred conspiracy.

2. Whether a vertical termination agreement that eliminates intrabrand competition must be upheld under the rule of reason absent proof of actual market-wide competitive harm even though the agreement is not

ancillary to an exclusive distributorship or any other valid marketing arrangement and there is no claim of benefit to interbrand competition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORECK CORPORATION, Petitioner	
WHIRLPOOL CORPORATIION and SEARS, ROEBUCK AND COMPANY, Respondents	No. A-84

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Oreck Corporation petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on November 4, 1980.

OPINIONS BELOW

The opinion of the court of appeals is reported at 639 F.2d 75 (2d Cir. 1980). The court of appeals panel and en banc opinions in an earlier appeal are reported at 563 F.2d 54 (2d Cir. 1977) and 579 F.2d 126 (2d Cir. 1978). The denial of a petition for writ of certiorari from the en banc decision is reported at 439 U.S. 946 (1978). Copies of the court of appeals en banc opinion and the panel opinion in the second appeal are reprinted in the Appendix. */

JURISDICTION

The court of appeals entered judgment on November 4, 1980. Petition for

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*/ The Appendix is cited as "App." Proceedings below are cited in the joint appendix to the Second Circuit as "JA". Trial transcript passages are cited as "Tr."; plaintiffs trial exhibits are identified as "PX" and are cited to their location in the Book of Exhibits as "E".

rehearing and suggestion for rehearing en banc were denied on May 13, 1981. On July 30, 1981, Mr. Justice Marshall extended the time to petition for certiorari to and including September 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in this antitrust conspiracy case, the court of appeals, in overruling the district court's finding that there was sufficient evidence of conspiracy to submit to the jury, erred by failing to follow established precedents of this Court and lower courts that the conspiracy issue may not be taken from the jury where there is evidence, including evidence of anticompetitive motive and actions contrary to economic

self-interest, from which a jury could have inferred conspiracy.

2. Whether a vertical termination agreement that eliminates intrabrand competition must be upheld under the rule of reason absent proof of actual market-wide competitive harm even though the agreement is not ancillary to an exclusive distributorship or any other valid marketing arrangement and there is no claim of benefit to interbrand competition.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1 provides in pertinent part:

> "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

several states, or with foreign nations, is declared to be illegal . . ."

STATEMENT

A. The Facts

1. The Oreck-Whirlpool Relationship

Whirlpool Corporation ("Whirlpool") manufactures numerous household products, including vacuum cleaners which it has made since 1957. Whirlpool, one of a declining number of United States vacuum cleaner manufacturers, had two customers during the period with which this case is concerned. Its principal customer since 1957 has been Sears, Roebuck and Company ("Sears"), a national retailer selling Whirlpool cleaners under the "Kenmore" brand. From 1963 to 1971 Whirlpool's other customer, Oreck Corporation ("Oreck"), was the exclusive national

distributor for Whirlpool cleaners marketed under the "Whirlpool" brand.

The appointment in August 1963 of Oreck as the exclusive United States distributor of Whirlpool cleaners (JA 246-50) followed Whirlpool's unsuccessful effort to market its Whirlpool brand cleaners through independent appliance dealers. (JA 564-65). Whirlpool's revised marketing plan (the "Stroop Report" (JA 248-250 and E 79 at E 122)) as well as the statements of Whirlpool's Vice President (JA 569-71, 573-75 and 600-601), conditioned Oreck's distributorship on its selling "high list, high profit" Whirlpool products to major department stores, with Oreck acting as middleman and with retail sales to be made only at Whirlpool's suggested prices.

Initially, Oreck followed the marketing plan set forth in the Stroop Report, but upon determining that the Whirlpool line was not competitive at high retail prices, Oreck changed its distribution technique. Thus, beginning in 1966 Oreck sold its cleaners to janitorial suppliers for resale to commercial customers on a high volume basis (JA 273-276); and in late 1967 Oreck began direct mail sales at one-half the suggested retail price. Under its revised distribution system, Oreck's total sales increased from 8,384 units in 1967 to 78,203 in 1971. (JA 627; 632). Whirlpool refused to extend Oreck's distributorship after December 31, 1971, notwithstanding the nine-fold increase in sales since 1967. This action was filed by Oreck in September 1972 (infra, p.12).

2. Evidence of Conspiracy

The district court found there was ample evidence of a Sears-Whirlpool conspiracy to submit to the jury. (App. 20A.) This evidence related to (i) Sears acquiescence in the Oreck distributorship as long as Oreck followed the Stroop blueprint of high price distribution to major department stores; (ii) Sears extraordinary leverage over Whirlpool; (iii) Sears' motive to remove Oreck from the low price, mail order market; (iv) Sears' complaints to Whirlpool about Oreck's mail order sales; and (v) Whirlpool's termination of Oreck, although contrary to Whirlpool's economic self-interest.

The actions of Sears and Whirlpool arise in the context of a 50 year relationship that has rendered Whirlpool a Sears'

captive. For example, from 58% to 71% of Whirlpool's annual sales of all products are to Sears (PX 632 (E 253)), Whirlpool is Sears' "principal source" of major home appliances (PX 346 (E 180 at E 183)); Sears is a substantial shareholder in Whirlpool (JA 641) and is represented on its board of directors (JA 652); and the two companies jointly control other Sears suppliers. (JA 644-45, 1039).

With respect to vacuum cleaner sales, Whirlpool has made cleaners for Sears since 1957 (JA 647-48); officials of Sears and Whirlpool met regularly to discuss and exchange marketing plans and statistics (JA 741-42; PX 713A (E 321); PX 719A (E 420); PX 724A (E 457)); Sears dictates the price it is willing to pay for Whirlpool cleaners (JA 758, 764-65, 767-69); Sears owns the tools

and dies Whirlpool uses to manufacture cleaners and can veto their use to make cleaners for other companies (JA 743-46, 760-61); and Whirlpool's marketing goal is the advancement of Sears in the vacuum cleaner market. (PX 723A (E 455)).

Whirlpool is solicitous of Sears. Whirlpool's Stroop Report declares that the Whirlpool brand should have a retail price "comparable" to Sears because "Sears becomes very unhappy" if the Whirlpool brand is sold for less than Sears' Kenmore brand. (PX 160 (E 93)). When Oreck deviated from the Stroop blueprint by selling Whirlpool cleaners by mail at a price level lower than originally planned, Sears and Whirlpool both reacted promptly. In July 1966 Whirlpool voiced "serious objection" to the price at which an Oreck janitorial supply customer was advertising (PX 25 (E 29)), and shortly after

Oreck began its low price mail order strategy Sears executives complained to Whirlpool about Oreck's mail order selling. (JA 1031-1032, 1038, 1039). Moreover, Sears had an obvious motive to discourage Oreck's sales since Oreck was selling at a low price and invading the historic Sears' mail order market.

Finally, Whirlpool's termination of Oreck was contrary to its own economic self-interest. Thus, Whirlpool executives had praised Oreck's sales performance (PX 46, E 50; PX 367, (E 200, 201)); Oreck's sales were profitable to Whirlpool (JA 583, 584, 588-89); the loss of the Oreck business increased Whirlpool's per unit cost of manufacture at a time when it was operating below capacity (JA 510, 528); and the only reason a Whirlpool executive could give for

terminating Oreck was the failure to sell "high-end vacuum cleaners" (JA 573-76).

B. Proceedings Below

The action was filed by Oreck in September 1972, charging a conspiracy between Whirlpool and Sears to exclude Oreck from the market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. At the first trial, the judge instructed the jury that such an agreement, if proved, would be illegal per se. The jury found a conspiracy and returned a verdict for Oreck in the amount of $750,000 (trebled to $2.25 million).

On appeal, the United States Court of Appeals for the Second Circuit reversed, 2 to 1, and held that the per se instruction was erroneous. 563 F.2d at 58, 59. On rehearing en banc, the panel majority's decision was affirmed, 6 to 2, because, inter

alia, the Sears-Whirlpool termination agreement was a "vertical" restriction which, under the rule of Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54 (1977), had to be examined under the rule of reason standard. Furthermore, the en banc panel held that under the rule of reason Oreck would have to show "an anticompetitive effect in the vacuum cleaner industry as a whole." 579 F.2d at 133, (App. 51A). The Supreme Court denied Oreck's petition for a writ of certiorari, with Justices Brennan, White, and Blackmun dissenting. 439 U.S. 946 (1978).

At the conclusion of Oreck's case-in-chief in the second trial, the district court granted defendants' motion for a directed verdict, declaring that (1) "there was an issue to submit to the jury as to whether there is a conspiracy to terminate

Oreck's distributorship" (App. 20A-21A); but that (2) Oreck had failed to demonstrate that the effect of the Sears-Whirlpool agreement was "anticompetitive in the vacuum cleaner industry as a whole." (App. 21A).

REASONS FOR GRANTING THE WRIT

This case raises two fundamental and important issues under the antitrust laws. The first issue relates to the quantum of proof needed to show conspiracy and the proper role of judge and jury in antitrust cases. Squarely presented is the correctness of the court of appeals' summary rejection of Oreck's antitrust case on the ground of insufficient evidence of conspiracy notwithstanding proof of anticompetitive motive, conduct contrary to economic self-interest, and a "common design" among the defendants.

The significance of this question is particularly great because of an ongoing lower court trend that undercuts important holdings of this Court and threatens to erode the force of the Sherman Act's prohibition against conspiracies in restraint of trade.

Second, this case raises a significant question never resolved by this Court as to the application of the rule of reason to a vertical termination agreement where the agreement itself is not ancillary to an exclusive distributorship, where intrabrand competition has been eliminated, and where no benefits to interbrand competition have been claimed. Specifically, review is necessary to dispel the erroneous notion that, even in this setting, proof of adverse industry-wide market effect is required.*/

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*/ This issue was raised in part in Oreck's petition for writ of certiorari from the

[Footnote */ continued on following page.]

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE LAW OF THIS COURT ON PROOF OF ANTITRUST CONSPIRACY AND IMPROPERLY INCREASES THE QUANTUM OF CONSPIRACY PROOF REQUIRED IN ORDER TO REACH A JURY.

In holding that plaintiff failed to present sufficient evidence to "establish" a conspiracy between Whirlpool and Sears, 639 F.2d at 78, (App. 3A), the court of appeals

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[Footnote */ continued from page 15]

earlier en banc decision, but it was then uncertain whether there existed any countervailing, interbrand benefits to the agreement. The Second Circuit en banc panel apparently assumed there were, because it persistently analogized the case to an exclusive distributorship controversy where the rule of reason would apply. Oreck Corporation, 579 F.2d at 129-130. (App. 42A) But, discovery after the en banc decision revealed that neither Sears nor Whirlpool claimed any justification for their two-firm agreement, and Sears specifically denied that it was an exclusive distributor. Thus, it is now clear that there are no such interbrand benefits. The issue, therefore, is without factual conflict and is ripe for review at this time.

erodes the jury's role as a factfinder and erects new and erroneous barriers to proof of antitrust conspiracy. Specifically, in affirming summary disposition of the case, the court of appeals (a) ignored the mandate of American Tobacco Co. v. United States, 328 U.S. 781 (1946) and Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962), that conspiracy is simply a "common design" and that the elements of proof are not to be tightly compartmentalized and then casually discarded; (b) misapprehended the probative value of acts contrary to a defendant's economic self-interest, disregarding this Court's decision in Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); and (c) overlooked the central role of anticompetetive motive as proof of conspiracy. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962);

see, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968). Review is necessary to correct the court of appeals' error and to halt a trend of lower court decisions that increases the quantum of antitrust conspiracy proof.*/

A contract, combination, or conspiracy is simply "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement."

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*/ See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), cert. denied, 101 S. Ct. 1981 (1981); A.G. Rogers Co. v. Merck & Co., Inc., 498 F. Supp. 5 (E.D. Tenn. 1980); Carr Electronics Corp. v. Sony Corp., 472 F. Supp. 9 (N.D. Cal. 1979). Cf. Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2d Cir. 1980) ("just barely" sufficient evidence of a combination.); Battle v. Lubrizol Corp., 513 F. Supp. 995 (E.D. Mo. 1981) (adequate evidence to submit to the jury).

American Tobacco, 328 U.S. at 810. Since conspiracies "are seldom capable of proof by direct testimony," Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 612 (1914), concerted action may be inferred from a "course of dealings or other circumstances as well as an exchange of words." American Tobacco, 328 U.S. at 809-10. Furthermore, plaintiffs are entitled to benefit from all inferences that a reasonable jury could draw "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Continental Ore Co., 370 U.S. at 699.

These principles are particularly important on directed verdict and summary judgment where the evidence is viewed most favorably to the non-moving party who, in

turn, receives the benefit of all reasonable inferences, Galloway v. United States, 319 U.S. 372, 395 (1943); and where the motion is not to be granted unless reasonable men could arrive at only one conclusion or there is a complete absence of probative evidence. Armstrong v. Commerce Tankers Corp. 423 F.2d 957, 959 (2d Cir.), cert. denied, 400 U.S. 833 (1970). Further, in a case such as this, where motive is crucial, summary procedures are particularly inappropriate. Poller 368 U.S. at 473.

The court of appeals has violated these principles in holding that Oreck's evidence was insufficient. In fact, there was, as the district court held, ample evidence to submit to the jury.*/

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*/ The court of appeals' treatment of Oreck's conspiracy proof is particularly

[Footnote */ continued on following page.]

The panel weighed Oreck's proof of conspiracy and, unlike the district court, ignored or badly distorted evidence that Whirlpool acted contrary to its own economic self-interest in terminating Oreck. Yet, this would be important conspiracy evidence, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 223-25 (1939), because conduct contrary to economic self-interest is, along

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disingenuous in light of prior decisions in this case: (i) in the first trial the jury found a conspiracy and the district court held that the evidence supported this finding; (ii) on appeal, the defendants briefed the conspiracy issue, but the court implicitly rejected those arguments by remanding the case for a retrial on the issue of the reasonableness of the Sears-Whirlpool agreement. 563 F.2d at 58; and (iii) at the retrial, the district court declared that there was "no problem" in submitting the conspiracy issue to the jury (App. 20A), and that, in its view, the court of appeals "found evidence to support" the conspiracy judgment obtained in the first trial. (App. 20A).

with motive, one of the two "critical" elements of conspiracy proof. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 114 (3d Cir. 1980), cert. denied, 101 S. Ct. 1981 (1981).*/

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*/ Oreck presented ample evidence on the self-interest issue. Oreck clearly was of commercial benefit to Whirlpool, because it's volume increased nine fold in four years (E 499); this performance exceeded Whirlpool's expectations (E 208); the distributorship was profitable (JA 584, 588-89); and the Whirlpool executive most familiar with the Oreck account urged that it be continued (JA 632). Yet, Whirlpool terminated Oreck when it was operating far below capacity (JA 451), thereby increasing Whirlpool's unit costs. (JA 510-11). Even after Oreck's termination, Whirlpool acted contrary to its own self interest when it refused Oreck's offer to purchase $1,000,000 of its inventory for full price. Instead, Whirlpool sold the inventory at half price to a third party, (JA 418-20, 554-55, 589-91). The panel erred when it reasoned that this was justified because Oreck owed $220,000 to Whirlpool at the end of 1971. 639 F.2d at 80. In fact, there was no such debt at the time Whirlpool made that economically irrational decision. (JA 414-15, E 71).

Instead of permitting the jury to weigh the significance of these seemingly irrational acts, the panel cavalierly held that the actions were consistent with Whirlpool's legitimate commercial objectives. 639 F.2d at 79, (App. 10A-11A). Surely, however, a jury could draw a contrary inference, particularly when, unlike the court of appeals, it would be viewing all the evidence and not tightly compartmentalizing each piece and disposing of it seriatim, a practice condemned in Continental Ore, 370 U.S. at 699.

Likewise, the panel ignored the role of anticompetitive motive; that is, whether Whirlpool acted unilaterally in terminating Oreck and did so for legitimate business reasons, or whether it entered into a "common design and understanding" with

Sears to get rid of Oreck's competition. American Tobacco, 328 U.S. at 810. Oreck's evidence established that the defendants had such an anticompetitive motive: between 1967-1971 Oreck's mail order sales at discount prices increased sharply at a time when Sears' mail order sales of upright units were plunging. (PX 825 (E 498)). This occurred in a setting where Sears enjoyed a unique relationship with Whirlpool and had substantial leverage over it (supra, p. 8); where Oreck had become a Whirlpool distributor on condition that it abide by the Stroop blueprint and sell at high prices to high priced stores, a strategy intended to shelter Sears from Oreck's competition (supra, p. 10); and where Sears had complained to Whirlpool when Oreck deviated

from the Stroop Report and entered into low price, mail order selling.*/

In light of the fact of anticompetitive motive and actions contrary to economic self-interest, the court of appeals' decision is in conflict with the principles of Poller, First National Bank, Galloway, and

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*/ Supra, p. 10. The panel dismissed these complaints, as well as Sears' comments about Oreck's advertising, as merely "normal marketplace behavior." 639 F.2d at 80, (App. 12A.) Yet, this determination is for the jury because it presents a classic question of motive. A jury could have found as easily that the complaints to a company (Whirlpool) that was virtually a captive of the complainant (Sears) were attempts to enforce a marketing plan (the Stroop Report) that was known to Sears and had vital price elements. These acts would be illegal. See, United States v. Parke-Davis & Co., 362 U.S. 29 (1960). Furthermore, the complaints of the dominant Sears are intrinsically more coercive than the many complaints of weak dealers. See, United States v. General Motors, 384 U.S. 127 (1965).

lower court cases on directed verdicts. As in Poller, the question of motive here is central and, unlike First National Bank, it is "much more plausible," 391 U.S. at 285, to believe that the interests of Oreck, on the one hand, and Sears and Whirlpool, on the other, did not "coincide" but in fact were in such conflict that the defendants "embarked on a plan to drive [Oreck] out of business." Compare, First National Bank, 391 U.S. at 284-286, with Poller, 368 U.S. at 470-473. Further, unlike First National Bank, there was here far more than merely a refusal to deal. In this setting, the court of appeals was simply wrong when it held, in effect, that reasonable men could arrive at only one conclusion, i.e., that there was no conspiracy. Armstrong, 423 F.2d at 959.

Review by this Court is necessary to reiterate that its leading cases on conspiracy proof are still authoritative; that judges and juries each have their proper role; and that summary proceedings are out of place where, as here, there is compelling circumstantial evidence of conspiracy.

II. THE DECISION PRESENTS AN IMPORTANT RULE OF REASON ISSUE THAT HAS NEVER BEEN RESOLVED BY THIS COURT AND WHICH IS THE SUBJECT OF ERRONEOUS LOWER COURT CASES.

The en banc court of appeals opinion required Oreck to prove that its termination had "an anticompetitive effect in the vacuum cleaner industry as a whole . . .," 579 F.2d at 133, (App. 51A), and on remand the district court, applying the court of appeals' standard, held that there was insufficient proof to submit to the jury that the effect of the termination was anticompetitive

in that entire industry. (App. 21A). Oreck has consistently argued that such a requirement of actual marketwide effect is erroneous.

Review by this Court is necessary to resolve the question of whether the total elimination of intrabrand competition by agreement violates Section 1 of the Sherman Act where, as here, (i) there are no countervailing benefits to interbrand competition, and (ii) the agreement is not ancillary to an exclusive distributorship and has no other redeeming virtue. Review is particularly timely because the lower courts are moving to engraft onto the rule of reason the superfluous and erroneous requirement of actual market effect or market power.*/

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*/ See, e.g., Ron Tonkin Gran Turismo v. Fiat, 637 F.2d 1376, (9th Cir. 1981);

[Footnote */ continued on following page.]

This Court has never dealt with the issue of actual market effect in the context of a vertical termination agreement. In other antitrust contexts, however, this Court has made clear that it is the nature of the agreement, not the magnitude of actual market effect in a particular fact situation, that determines "unreasonableness." Thus, the Court has held that the elimination of a small retailer can be illegal, because an antitrust plaintiff need not show "public injury" in order to prevail. Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213

[Footnote */ continued from following page.]

Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); H&B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978); Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).

(1959); see, Radiant Burners v. People's Gas Light and Coke Co., 364 U.S. 56, 60 (1961).

Similarly, it has never been necessary to prove actual market effect in other situations; for example, where the restraint involves horizontal price fixing, United States v. Trenton Potteries Co., 273 U.S. 392 (1927), Catalano Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); arrangements that have the effect of pegging or stabilizing prices, United States v. Socony-Vacuum Oil Co., 310 U.S. 223 (1940); horizontal market divisions, United States v. Topco Associates, 405 U.S. 596 (1972); resale price maintenance, Albrecht v. The Herald Co., 390 U.S. 145 (1961); and tying arrangements, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

In all these cases, unreasonableness turned upon the nature of the restraint, that is, its "competitive significance." National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978). In the case of restraints held illegal per se, this Court necessarily determined that their nature and effect is "plainly anticompetitive," id.; but, such a determination does not require specific proof of effect in every factual setting. "When a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se." Catalano, 446 U.S. at 649.

While the Court has dispensed with the requirement of showing actual competitive harm in cases involving per se restraints, there is no legal or logical basis for applying a different requirement to restraints that could in a particular case be procompetitive but which the evidence shows are totally devoid of any interbrand benefit or redeeming virtue.*/ It would be a tyranny of labels to fail to apply the same principle in both situations solely on the basis of the name of the restraint.

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*/ Following the earlier en banc decision of the court of appeals, Oreck asked Sears and Whirlpool to state all reasons and justifications for the agreement. In response, neither defendant attempted to provide any justification. (JA 654-55, 1040). Moreover, Sears explicitly denied that it had ever asked to be made, or had ever in fact been made, the exclusive distributor of Whirlpool manufactured cleaners. (JA 1040-41).

Furthermore, the Second Circuit's erroneous requirement of market effect strikes at the heart of rule of reason analysis, which is the balancing of detriment and benefit to competition. In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), this Court approved certain non-price vertical restrictions on intrabrand competition because of their countervailing benefit to interbrand competition. The necessary premise of Continental T.V. is that interbrand benefit may be achieved because the restriction allows the "manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 54. Here, no such "efficiencies" were shown and no interbrand benefit was claimed; yet, intrabrand competition was eliminated and Oreck's price competition was removed from an oligopolistic market. Thus, the termination necessarily

had an "impact on competitive conditions." Professional Engineers, 435 U.S. at 690. When the court of appeals imposes, as it does here, a further requirement of actual effect in the "vacuum cleaner industry as a whole," (App. 51A), it ignores the holding and premise of Continental T.V. as well as the logic of antitrust analysis generally.*/

There is demonstrable peril in leaving unresolved the important antitrust issue presented here: the Second Circuit, in the case at bar, and at least the Fifth and Ninth Circuits (supra, p. 28, n. 1) now

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*/ Restraints that are unrelated to any co-operative efficiency-enhancing endeavor are characterized by one commentator as "naked." Bork, The Antitrust Pardox, 263 (1978). The naked-ancillary dichotomy, first enunciated in Addyston Pipe & Steel Co. v. United States, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), applies here for the reasons already stated: the restraint is not ancillary to any valid marketing goal and it has no efficiency-enhancing effect.

seem to require proof in rule of reason cases of general market effect or market power. The corrosive effect of such a burdensome requirement is never more obvious than in this case: a two-firm termination agreement (i) that was not ancillary to a Sears exclusive distributorship; (ii) for which neither Sears nor Whirlpool claimed any benefit to interbrand competition; and (iii) which eliminated the only distributor of Whirlpool cleaners, i.e., all intrabrand competition. Yet, with the superfluous requirement imposed by the Second Circuit, no antitrust violation may be found.

Review by this Court is necessary to resolve the important market effect issue under the rule of reason test, and to declare that proof of marketwide effect is unnecessary where a vertical termination agreement

eliminates intrabrand competition without any countervailing benefit to interbrand competition.

CONCLUSION

This case raises important and controversial issues of proof of antitrust conspiracy and violation under the rule of reason. Certiorari should be granted to correct these errors and to clarify two important areas of antitrust law.

Respectfully submitted,

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September 22, 1981

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 6 - September Term, 1980

(Argued September 4, 1980
Decided November 5, 1980)

Docket No. 79-7791

ORECK CORPORATION,

Plaintiff-Appellant,

-v.-

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants-Appellees.

B e f o r e :

TIMBERS, VAN GRAAFEILAND and NEWMAN,

Circuit Judges.

Appeal from a judgment entered in the Southern District of New York, Richard Owen, District Judge, following a remand from our Court sitting en banc, 579 F.2d 126 (2 Cir.), cert. denied, 439 U.S. 946 (1978), the judgment on remand having been entered on a directed verdict for defendants in an antitrust action which alleged a conspiracy in unreasonable restraint of trade to exclude plaintiff from the vacuum cleaner market in violation of the Sherman Act.

Affirmed on the ground of insufficient evidence to establish a conspiracy.

TIMBERS, Circuit Judge:

This action was commenced by appellant, Oreck Corporation, in September 1972. Following a jury trial, judgment was entered in July 1976 against appellees, Whirlpool Corporation and Sears, Roebuck and Co., and in favor of appellant on two counts of a seven count complaint charging violations of Section 1

of the Sherman Act, 15 U.S.C. § 1 (1976). On appeal, a divided panel of this Court reversed and remanded the case for a new trial. 563 F.2d 54 (2 Cir. 1977). On rehearing en banc, we adhered to the decision of the panel majority and remanded the case for a new trial. 579 F.2d 126 (2 Cir.), cert. denied, 439 U.S. 946 (1978).

At the close of appellant's case at the trial on remand, the district court, Richard Owen, District Judge, granted appellees' motion for a directed verdict. From the judgment entered thereon, appellant has appealed. We affirm on the ground that there was insufficient evidence to establish a conspiracy in restraint of trade.

I.

FACTS

We assume familiarity with the comprehensive statements of the facts underlying this dispute as set forth in the late Judge

Anderson's panel and en banc opinions referred to above.

Since 1957 Whirlpool has manufactured vacuum cleaners for Sears. The latter has sold them under Sears' "Kenmore" label. Whirlpool also has tried, unsuccessfully, to sell its vacuum cleaners under its own name. From 1963 until 1971 Oreck was the exclusive distributor of vacuum cleaners under the "Whirlpool" trade name.

On December 31, 1971 Whirlpool allowed Oreck's exclusive distributorship to expire according to its terms and refused to extend it. Oreck commenced the instant action in September 1972 claiming that Whirlpool's refusal to renew the sales agreement resulted from an illegal contract, combination or conspiracy between Whirlpool and Sears unreasonably to restrain trade by excluding Oreck from the vacuum cleaner market in the

United States and Canada.[1/] More specifically, Oreck alleged that its distributorship was terminated by Whirlpool at the insistence of Sears, a much larger purchaser of Whirlpool products.

Appellees contended by way of defense that Whirlpool refused to renew Oreck's contract because of Oreck's failure to follow Whirlpool's marketing strategy for its vacuum cleaners. According to testimony adduced at the first trial, as Judge Anderson pointed out in our earlier en banc opinion, Whirlpool intended to market its name brand vacuum cleaners in retail department stores, but Oreck's campaign focused increasingly on

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1/ During the trial on remand Oreck withdrew the count regarding Canadian sales. This appeal therefore is concerned only with Oreck's claim of a conspiracy to exclude it from the United States markets.

In the interest of simplicity, we use the statutory term "conspiracy" in this opinion. Our holding that there was insufficient evidence of a "conspiracy" applies with equal force to the statutory terms "contract" and "combination".

janitorial supply houses and mail order sales. 579 F.2d at 128.

Appellees further contended that Sears never considered Oreck a competitive threat. Indeed, despite Oreck's claim that it sold vacuum cleaners at "one-half the retail price," there was no evidence that it ever undercut Sears on the price of vacuum cleaners.

II

THE LEGAL STANDARD

A plaintiff in a civil action, in order to sustain its claim under Section 1 of the Sherman Act, must establish two elements: first, that the defendants entered into a "contract, combination . . . or conspiracy"; and, second, that it was "in restraint of trade or commerce among the several states." 15 U.S.C. § 1 (1976); House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2 Cir. 1962); DuPont Glore Forgan Inc. v. Am. Tel. & Tel. Co., 437 F. Supp. 1104, 1111 (S.D.N.Y. 1977), aff'd, 578 F.2d 1367

(2 Cir. 1978). We hold that Oreck did not sustain at trial its burden of proving a conspiracy between Whirlpool and Sears. We therefore affirm the judgment of the district court entered on its directed verdict for appellees.[2/]

It is elemental that Whirlpool's termination of its distributorship contract with Oreck cannot be held to have violated the Sherman Act unless it stemmed from "a contract, combination or conspiracy" between Whirlpool and Sears. FLM Collision Parts Inc. v. Ford Motor Co., 543 F.2d 1019, 1029 (2 Cir. 1976), cert. denied, 429 U.S. 1097 (1977). It is not necessary that such a combination be established by direct proof of oral or written agreements; it may be proven by inferences drawn from circumstantial evidence, including the acts and conduct of the alleged conspi-

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2/ The previous opinions of this Court in this case did not reach the question of the sufficiency of the evidence of a conspiracy.

rators. Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969). A mere showing of close relations or frequent meetings between the alleged conspiractors, however, will not satisfy a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement. Miller v. New York Produce Exchange, 550 F.2d 762, 767 (2 Cir. 1976), cert. denied, 434 U.S. 823 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9 Cir. 1976), cert. denied, 429 U.S. 1073 (1977); Venzie Corp. v. United States Mineral Products Co., Inc., 521 F.2d 1309, 1312-13 (3 Cir. 1975).

In the instant case Oreck cannot be said to have sustained its burden by merely establishing that Sears was an important customer with close ties to its supplier, Whirlpool, or even by showing that Sears had substantial economic muscle to enable it to force Whirlpool to terminate its relationship with Oreck. Upon the facts of this case, it was necessary

for Oreck to establish that Sears used that relationship or its power to prod Whirlpool into ending the Oreck distributorship.

III.

ORECK'S EVIDENCE IN THE DISTRICT COURT

Much of the circumstantial evidence adduced by Oreck focused on the substantial economic ties between the alleged conspirators. Since 1958 Sears has been Whirlpool's largest customer for vacuum cleaners and other appliances. Between 1962 and 1972 Sears owned between 3% and 4-1/2% of Whirlpool's outstanding common stock. Sears' subsidiary, Allstate Insurance Co., owned between 8/10 of 1% and 2-1/2% of the outstanding Whirlpool stock. Sears' officers have served on Whirlpool's board of directors. Sears held title to the tools which Whirlpool used to manufacture its vacuum cleaners. It did so pursuant to an agreement under which the cost of the tools, although initially paid for by Whirlpool, was amortized over a number of units as

produced; and in this way Sears ultimately reimbursed Whirlpool for the cost of the tools. This gave Sears control over the use of the tools and the power to determine for whom Whirlpool could manufacture vacuum cleaners.

There was little evidence, either direct or circumstantial, that Sears actually exercised any of this economic muscle in the manner claimed by Oreck. While Sears' ownership of the tools used to manufacture Oreck's products gave Sears a direct means of cutting off Oreck's supply of vacuum cleaners, the evidence showed that Sears authorized Whirlpool's use of the tools to manufacture vacuum cleaners for Oreck and never rescinded that authorization, although Sears did receive royalties on Oreck's sales.

It is argued that the existence of a conspiracy might be inferred from actions taken by Whirlpool which were inconsistent with its economic self-interest. Oreck, however, has failed to establish that Whirlpool took any

action which did not comport with its legitimate commercial objectives. Oreck has attempted to make much of Whirlpool's refusal to sell Oreck its inventory of vacuum cleaners after the termination of its distributorship. The record shows, however, that after December 1971, when the distributorship was terminated, Oreck owed Whirlpool over $220,000. Whirlpool was forced to sue to collect this indebtedness. Under these circumstances, Whirlpool's refusal to sell after the termination of the distributorship can hardly be said to be contrary to Whirlpool's economic self-interest.

Oreck did show that Sears executives had forwarded to Whirlpool copies of direct mail advertising used by Oreck to sell Whirlpool vacuum cleaners with indications that Sears considered the advertising improper. In 1971, the final year of the distributorship, Oreck mailed over 20 million pieces of advertising to consumers, among whom were Sears employees. This advertising contained certain allegedly

false and misleading statements, including a statement that Whirlpool vacuum cleaners were being offered at half-price. These statements were the subject of complaints from other sources, including the Better Business Bureau.

That Sears brought these improper selling methods to Whirlpool's attention hardly rises to the level of evidence of a conspiracy unlawfully to exclude Oreck from the vacuum cleaner market. Sears argues that as a Whirlpool stockholder it had a legitimate business interest in advising Whirlpool of substandard advertising campaigns which Sears thought reflected poorly on Whirlpool's image with consumers. Moreover, even if Sears' actions were to be viewed as a complaint by one Whirlpool customer about the selling practices of another, such a complaint would not indicate illegal concerted action, since it is merely normal marketplace behavior for such complaints to be made. Carbon Steel Products Corp. v. Alan Wood Steel Co., 289 F. Supp. 584, 588 (S.D.N.Y. 1968).

This evidence at most showed that Sears was unhappy with Oreck's selling practices. Oreck urges, however, that Sears, as an important customer and stockholder of Whirlpool, had some economic power which it might have been able to use to compel Whirlpool's refusal to renew Oreck's exclusive distributorship. Based upon the evidence referred to above, any implication that Sears in fact used its leverage in a manner which indicated a conspiracy must rest upon sheer speculation insufficient to support a conclusion that Whirlpool and Sears engaged in an illegal "contract, combination . . . or conspiracy." Miller v. New York Produce Exchange, supra, 550 F.2d at 767.

The closest Oreck came to proving a conspiracy between Whirlpool and Sears was the testimony of David Oreck and Marshall Oreck, officers of appellant. They testified that on three occasions between 1967 and 1971 John Payne, the Whirlpool salesman responsible for

the Oreck account, told them that Sears disapproved of Oreck's selling tactics and implied that Oreck, by antagonizing Sears, was jeopardizing its continued relationship with Whirlpool.

Payne's out-of-court statements of course were hearsay. Fed. R. Evid. 801(c). Hearsay statements of a purported conspirator are not admissible against a co-defendant unless there is independent, non-hearsay evidence that established the declarant's participation in the conspiracy. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. Geaney, 417 F.2d 1116 (2 Cir. 1969), cert. denied, 397 U.S. 1028 (1970); United States v. Provenzano, 615 F.2d 37, 44 (2 Cir. 1980). The mere showing of a close association between defendants is not sufficient to satisfy the independent proof requirement. United States v. Ragland, 375 F.2d 471, 477 (2 Cir. 1967), cert. denied, 390 U.S. 925 (1968). Accordingly, even if Payne's state-

ments were to be considered as admissions of Whirlpool as a party defendant, Fed. R. Evid. 802(d)(2)(D),[3] in view of the complete lack of independent evidence of a conspiracy involving Sears, we hold that testimony regarding those statements should not have been admitted.[4]

3/ Whirlpool and Sears argue, with some force, that Payne's statements should not have been admitted even against Whirlpool under the hearsay exception for admissions because questions of Whirlpool policy were beyond the scope of Payne's employment as a salesman. Fed. R. Evid. 801(d)(2)(D); Flintkote Co. v. Lysfjord, 246 F.2d 368 (9 Cir.), cert. denied, 355 U.S. 835 (1957); and on the further ground that Oreck failed to lay a proper foundation to show the source of Payne's knowledge. Northern Oil Co., Inc. v. Socony Mobil Oil Co., Inc., 347 F.2d 81 (2 Cir. 1965). In view of our holding that independent evidence of a conspiracy was insufficient to warrant the admission of the Payne statements, we find it unnecessary to determine the relationships between Payne, his employer and Oreck. Suffice it to say that, in view of Oreck's failure to establish whether Payne's statements were based on rumor, innuendo, or his own conclusions about Sears' interests, we would regard the Payne statements, even if admissible, as having little probative value.

4/ We note that the district court, in receiving the Payne statements, characterized as "scanty" the independent evidence of a conspiracy involving Sears. We think that characterization was overly generous.

Even if the Payne statements had been properly admitted, the sufficiency of Oreck's evidence of conspiracy would have been doubtful at best. Absent the Payne statements, clearly the evidence was insufficient to establish a contract, combination or conspiracy between Whirlpool and Sears.[5/]

5/ We reject summarily Oreck's evidentiary claims as being without merit.

The only one worthy of brief mention is its claim that the district court erred in refusing to admit parts of a memorandum purporting to include the conclusions of an Oreck employee about a conversation he was said to have had with Whirlpool in 1966. The witness whose conclusions allegedly were recorded could not verify the authenticity of the memorandum beyond acknowledging that it was the "type" sometimes prepared from his recollections. He could not recall the factual basis for his conclusions. In view of the unavailability of cross-examination on the accuracy of the observations, their factual basis, Monroe v. Board of Educ., 65 F.R.D. 641 (D. Conn. 1975), or the accuracy of transcription, United States v. Judon, 567 F.2d 1289, 1294 (5 Cir. 1974), we decline to hold that the district court erred in excluding the memorandum.

Moreover, as Oreck's counsel stated at trial, the recorded recollection of an Oreck employee about a conversation with Whirlpool was not probative on the question of a conspiracy between Whirlpool and Sears.

We hold that Oreck failed to establish its claims under Section 1 of the Sherman Act.

IV.

DENIAL OF ORECK'S MOTION TO AMEND ITS COMPLAINT

Oreck also contends that the district court erred in denying its motion to amend its complaint prior to the trial on remand to include claims of tortious inference with its business relations.

The denial of such a motion is within the sound discretion of the district court. Zenith Radio Corp. v. Hazeltone Research, Inc., 401 U.S. 321, 330 (1971). Oreck had failed to assert these claims in the federal court at any time since the action was commenced in 1972. Although it did raise these claims in a related state court action, it apparently made a tactical decision to proceed only on its antitrust claims in the federal court. Under these circumstances of extended delay and failure to raise initially claims of which Oreck was well

aware, we hold that denial of leave to amend was not an abuse of discretion. Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 971 (6 Cir. 1973), cert. denied, 416 U.S. 939 (1974).

In view of our essential holding that there was insufficient evidence of a conspiracy, we find it neither necessary nor appropriate to reach the other claims raised on appeal.

Affirmed.

OPINION OF THE DISTRICT COURT

ORECK CORPORATION,
Plaintiff,
vs.
WHIRLPOOL CORPORATION and
SEARS ROEBUCK & COMPANY,
Defendants

72 Civ. 3215

October 2, 1979
1:00 p.m.

(In open court; jury not present.)

THE COURT: Good morning, or good afternoon.

You left me over the weekend with a motion for a directed verdict claiming that the plaintiff had failed to prove a prima facie case on behalf of, I assume, all defendants. And I feel compelled to grant that motion in consideration of the record.

As I study both of the Court of Appeals opinions, the first as well as the second, there are really two issues that the Court of Appeals saw in this case. First, whether there was a conspiracy to terminate Oreck's distri-

butorship, and as to that, they found evidence to support that finding on the first trial. They found it, however, error, not to go farther and to treat this case under the rule of reason inasmuch as the Second Circuit did not categorize this, but o the other hand, treated it as the equivalent of a situation where there is an exclusive distributorship in which they say, in quoting the Packard Motorcar case, they say the rule is virtually one of per se legality unless certain things have been demonstrated. The demonstration has to be as to whether this obviously operates as an unreasonable restraint of trade.

So it is with the second that I have the problem. I had no problem with the first, we had the same evidence approximately on this trial as on the last trial. Really not much different in either scope or content. I have no problem with saying that there was an issue to submit to the jury as to whether there is

a conspiracy to terminate Oreck's distributorship, but when it comes to whether there is sufficient for a jury to find that this was an unreasonable restraint of trade, I do not find evidence on which a jury could base such a finding.

The Court of Appeals pointed out that where an exclusive distributorship is not part and parcel, this is quoting Packard, "part and parcel of a scheme to monopolize and effect competition, competition exists at both the buyer and seller levels, the arrangement has invariably been upheld as a reasonable restraint of trade."

I find in this record no credible proof that the net result and effect of the conduct of Sears and Whirlpool was anticompetitive in the vacuum cleaner industry as a whole.

I do note that some suggestion is made during the course of this trial that the Court should consider the mail order vacuum cleaner business as a sub-market, but I also

conclude that even giving full effect to what Dr. Sorensen would have said, his telling me about some people being mail order prone together with other evidence, I do not find sufficient evidence to submit to the jury the question of mail order vacuum cleaner sales as a possible sub-market.

There is no proof in this record, as I see it, that the conspiracy was designed to drive Oreck out of the vacuum cleaner business and I think you virtually conceded that to me on Friday. There is no proof in the record that this conspiracy was to restrain competition in the vacuum cleaner industry as a whole or to monopolize that industry or Whirlpool's refusal to renew Oreck's distributorship was to give Sears the power to, using the Court of Appeals' words, "to maintain the prices of the Kenmore machines at artificially high levels." Nor do I find that there is evidence that Whirlpool machines had a sufficient share of the vacuum cleaner market to permit Sears or any

other dealer to exploit a monopoly without feeling the pinch of interbrand competition. Again in the Court of Appeals' words.

Thus, summing up in their words again, there is no showing the elimination of Oreck either permitted the Whirlpool monopoly or gave Sears a market position from which it could raise retail prices.

This being so as I see it, there is no issue to submit to the jury as to whether or not there was a violation of Section 1 of the Sherman Act under the first cause of action which, as of now, is the only cause of action that remains in this case.

So I find accordingly in favor of the defendants. I grant the motion for a directed verdict, there being no prima facie case made out, and defendants may enter judgment accordingly.

You, of course, have your exception.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 76-7631

SEPTEMBER TERM, 1977

ORECK CORPORATION, Plaintiff-Appellee,

v.

Whirlpool Corporation and

SEARS, ROEBUCK AND CO., Defendants-Appellants.

BEFORE: ANDERSON, FEINBERG, MANSFIELD, MULLIGAN, TIMBERS, GURFEIN, VAN FRAAFEILAND, MESKILL, CIRCUIT JUDGES.

Filed May 1, 1978

On Rehearing En Banc

[Opinion]

Anderson, Cir. J.: The appellants, Whirlpool Corporation (Whirlpool) and Sears, Roebuck & Co. (Sears), appealed from a judgment entered on July 13, 1976, on a jury verdict against them and in favor of Oreck Corporation (Oreck), on two counts of a seven count complaint charging violations of §1 of the Sherman Act, 15 U.S.C. § 1. On appeal, a divided panel of this court reversed and remanded the case for a new trial. Oreck Corp. v. Whirlpool Corp. [1977-2 Trade Cases ¶61, 641], 563 F.2d 54 (2d Cir. 1977). Appellee's petition for a rehearing en banc was granted on December 15, 1977. The hearing of the appeal en banc was submitted on briefs by all of the parties and without further oral argument. On reconsideration we concur in the judgment of the panel majority, reverse the judgment of district court, and remand the

case for a new trial.

[Termination of Distributor]

The material facts of this dispute have been set forth in the opinion of the panel majority and will be reviewed here only briefly. Whirlpool has been in the vacuum cleaner business since 1957 when it acquired the Birtman Electric Co. and began manufacturing vacuum cleaners for Sears, to be sold under the "Kenmore" label. Whirlpool also sought to sell vacuum cleaners under its own tradename. In August, 1963, Whirlpool entered into an agreement with Oreck, by which the latter was appointed the exclusive distributor of vacuum cleaners under the name of "Whirlpool" for an initial term of five years, with automatic extensions for one-year periods thereafter, absent six months prior notice of termination of the agreement by either party. Whirlpool gave Oreck formal notice of termi-

nation of the agreement on June 27, 1968; but after further negotiations, Whirlpool and Oreck entered into a substituted contract, dated August 1, 1968, which extended Oreck's distributorship through December 31, 1971; it did not, however, contain any provision for an extension. On May 14, 1971, Whirlpool informed Oreck that it intended to allow the sales agreement to expire according to its terms and, on December 31, 1971, Oreck's exclusive distributorship of "Whirlpool" products ended. The instant action followed in September of 1972.

This lawsuit is based on Oreck's claim that it was not afforded the opportunity for an additional period of time as Whirlpool's exclusive distributor at the behest and insistence of Sears, a much larger purchaser of Whirlpool products. Accordingly, Oreck's complaint charged both Whirlpool and Sears with engaging in a contract, combination, or

conspiracy in unreasonable restraint of trade to exclude Oreck from the vacuum cleaner market in the United States and Canada.[1/]

At trial, Oreck's case for liability rested principally upon the testimony of Marshall Oreck, its General Manager, and of David Oreck, its President. It was their contention that the reason for Whirlpool's failure to renew the contract was Sears' desire to end competition from Oreck. By way of defense and explanation of its action, Whirlpool presented the testimony of its officers who dealt with Oreck to show that, among other reasons, the contract was not renewed after

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1/ At no time in the course of this litigation has Oreck alleged that either its 1963 or its 1968 contract with Whirlpool in and of itself violated § 1 of the Sherman Act. Neither was alleged to be an agreement which attempted to fix prices or eliminate resale price competition, nor did it attempt to impose unreasonable geographical or customer restraints on Oreck's ability to compete.

December, 1971, because of Oreck's failure to follow the original marketing strategy contemplated by Whirlpool.[2/]

[Economic Effect]

Oreck presented no evidence that the net economic effect of the non-renewal if its contract was to restrain trade unreasonably in

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2/ According to their testimony, it was Whirlpool's intention that Oreck's distributorship would serve as an avenue to the sale of "Whirlpool" vacuum cleaners to department stores and other special retail accounts. There was further testimony that by 1965, Oreck had abandoned this marketing strategy and had resorted to sales to janitorial supply houses, and that Oreck further departed from Whirlpool's original plan by adopting, in 1967, a technique for making sales of "Whirlpool" machines through direct mail orders. It was undisputed that by 1970, mail order sales comprised over 90% of Oreck's business.

the vacuum cleaner industry in the United States and/or Canada.[3/] Nor did it show that alternative sources of supply were unavailabl- and that it was, therefore, excluded from competition in the vacuum cleaner business. David Oreck admitted that Oreck had been able to obtain vacuum cleaners from another manufacturer and was, at the time of trial, the world's largest supplier of "top fill upright vacuum cleaners."

Despite the lack of mention or reference to any evidence of an anticompetitive purpose or effect in connection with the alleged Whirlpool/Sears agreement, the trial court in-

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3/ David Oreck testified that the vacuum cleaner industry is a large one and that during 1971, when Oreck sold 78,203 vacuum cleaners, consumers purchased about 7.8 million cleaners. Oreck, therefore, had no more than a 1% market share at the time of the completion of its exclusive distributorship for Whirlpool. Moreover, there was at all relevant times, an abundance of vacuum cleaners available in the marketplace which were reasonably interchangeable with those manufactured by Whirlpool.

structed the jury that,

> The violations alleged by plaintiff are, if you credit them, unreasonable restraints of trade . . . If you find there was such an agreement [between Whirlpool and Sears "to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere"], then you should go on to consider damages. (Emphasis added.)

[Per Se Violation]

An almost identical charge was given with respect to count two, dealing with Oreck's alleged exclusion from the Canadian market.[4/] Under such instructions, the jury could simply

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4/ Count 2 of the complaint charged that Whirlpool and Sears unlawfully conspired to exclude Oreck from the vacuum cleaner market in Canada. (Counts 3 through 7 were dismissed.) At trial, Oreck contended that Whirlpool's refusal to grant its request that

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Whirlpool procure Canadian Standards Association approval for the "Whirlpool" vacuum cleaners it desired to sell in Canada, provided substantial evidence of the unlawful conspiracy to remove Oreck's competition against Sears, selling its "Kenmore" machinery through its subsidiary, Simpson-Sears Ltd., the sole distributor of Whirlpool-made products in Canada.

The 1963 and 1968 agreements between Whirlpool and Oreck both specifically stated that Whirlpool was appointing Oreck its exclusive distributor of certain "Whirlpool" products "for the United States of America and its possessions." The parties agree that this provision placed no restriction on the territory in which Oreck might sell goods purchased from Whirlpool. Whirlpool concedes that it refused to obtain Canadian Standards Association approval for the cleaners that Oreck was seeking to market in Canada, but argues that such approval was not a prerequisite to selling in Canada and that, in any event, Oreck sold vacuum cleaners in Canada during the period of its distributorship.

On this count, the trial judge instructed the jury that,

> "Arrangements . . . restricting the territory in which a product may be resold are unreasonable restraints of trade in and of themselves . . . You need not determine whether such arrangements are reasonable, or whether they have an impact upon the market place, nor need you be concerned with the business or supposed economic justi-

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fication for such arrangements . . ."

In light of the decision of the United States Supreme Court in Continental T.V., Inc., v. GTE Sylvania, Inc. [1977-1 Trade Cases ¶61, 488[, 433 U.S. 36 (1977), this instruction was incorrect. Efforts by a manufacturer to restrict the territory in which a distributor of its products operates are to be examined under the rule of reason standard. See Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc. [1978-1 Trade Cases ¶61,926], ---- F.2d ----, 46 U.S. L. W. 2492 (1st Cir. March 17, 1978).

It is undisputed that Whirlpool was not required to obtain Canadian Standards Association approval for its vacuum cleaners as requested by Oreck. That its refusal to do so may have been based on an agreement with its existing Canadian distributor does not, of itself, create a violation of the antitrust laws. It must further be found that this agreement was anticompetitive in purpose of effect. See Continental T.V., Inc. v. GTE Sylvania, Inc., supra; Quality Mercury, Inc. v. Ford Motor Co. [1976-2 Trade Cases ¶61, 086], 542 F.2d 466 (8th Cir. 1976), cert. denied, sub nom. Prestige Lincoln Mercury, Inc. v. Quality Mercury, Inc. 433 U.S. 914 (1977); Packard Motor Car Co. v. Webster Motor Car Co. [1957 Trade Cases ¶68,682], 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); Schwing Motor Co. v. Hudson Sales Corp. [1956 Trade Cases ¶68,564], 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957).

The trial judge's failure to instruct the

have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vacuum cleaners and, on that basis, have found them guilty (as it in fact did) of a per se violation of ¶ 1 of the Sherman Act. Yet the very same conduct can constitute the granting of a perfectly legal exclusive distributorship or one, at least, whose legality must be judged under the rule of reason standard. Packard Motor Car Co. v. Webster Motor Car Co. [1957 Trade Cases ¶68,682], 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); see

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jury on this point was plain error. Moreover, it inevitably prejudiced the jury's consideration of the first count even though the matter of sales in the Canadian market was set out in the second count. In the evidence, in the arguments, and in the district court's charge, this incident was used as an example of the claimed unlawful activity by Whirlpool and Sears to keep Oreck from selling more vacuum cleaners and to destroy Oreck's competitive activities. Throughout the trial, Whirlpool's refusal to procure Canadian Standards Association approval for the vacuum cleaners Oreck desired to sell in Canada was characterized as a major part of the alleged Whirlpool/Sears conspiracy to violate the antitrust laws.

also, United States v. Arnold, Schwinn & Co. [1967 Trade Cases ¶62,126], 388 U.S. 365 (1967), overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc. [1977-1 Trade Cases ¶61,488], 433 U.S. 36 (1977); Quality Mercury, Inc. v. Ford Motor Co. [1976-2 Trade Cases ¶61,086], 542 F.2d 466 (8th Cir. 1976), cert. denied sub nom, Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc., 433 U.S. 914 (1977); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd. [1969 Trade Cases ¶62,914], 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Bay City-Abraham Bros., Inc. v. Estee Lauder, Inc. [1974-1 Trade Cases ¶75,095], 375 F. Supp. 1206 (S.D.N.Y. 1974). On the instant reconsideration en banc, the issue is whether the per se standard, under which the trial judge charged the jury, was appropriate in light of the nature of the alleged Whirlpool/Sears agreement.

[Price Competition; Boycott]

Oreck's argument that the district court was correct in instructing the jury to apply the per se standard in this case, rests principally on two assertions: first, that Whirlpool's decision not to renew Oreck's distributorship was motivated by a desire to eliminate the price competition which Oreck was offering to Sears; and second, that this effort by Sears and Whirlpool to restrain competition constituted a group boycott expressly forbidden by the holdings of the United States Supreme Court in United States v. General Motors Corp. [1966 Trade Cases ¶71,750], 384 U.S. 127 (1966); and Klor's, Inc. v. Broadway-Hale Stores, Inc. [1959 Trade Cases ¶69,316], 359 U.S. 207 (1959).

With regard to the first of these points, it is undisputed that, at all times relevant, Sears was selling its "Kenmore" vacuum cleaners at prices below those charged by Oreck for

comparable "Whirlpool" models. The complaint did not allege, the evidence at the trial did not show, and counsel in summation did not argue, that Whirlpool was attempting to maintain high resale prices for its products by conspiring with its distributors or that its actions toward Oreck were an effort to chastise a dealer for refusing to cooperate in a scheme to fix or maintain prices. Cf. United States v. Parke, Davis & Co. [1960 Trade Cases ¶69,611], 362 U.S. 29 (1960). The contracts entered into by Oreck and Whirlpool in 1963 and 1968 clearly stated that Oreck had the sole right to determine its selling prices.

[Edge Effect]

Oreck concedes that there was no Sears/Whirlpool agreement to fix prices, but argues that the elimination of its distributorship amounted to tampering with the price structure for vacuum cleaners, equally a per se viola-

tion.[5/] See, United States v. Socony-Vacuum

5/ Oreck introduced no evidence at trial to show that the purpose of Whirlpool's refusal to renew Oreck's distributorship was to give Sears the power to maintain the prices of its "Kenmore" machines at an artificially high level. Cf. United States v. Socony-Vacuum Oil Co. [1940-1943 Trade Cases ¶56,031], 310 U.S. 150, 224-26 n.59 (1940). Neither did Oreck submit evidence to show that Whirlpool machines had a sufficient share of the vacuum cleaner market to permit any of its dealers to exploit a dealer monopoly without feeling the pinch of interbrand competition. See the Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 237 n.57 (1977). It appears from the record that there was effective competition in the vacuum cleaner business at the manufacturer level. When interbrand competition exists, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. See Continental T.V., Inc. v. GTE Sylvania, Inc., supra, at 52 n.19. In order to prove a violation of ¶ 1 of the Sherman Act, Oreck would have had to show that Whirlpool's agreement with Sears to eliminate Oreck's competition either promoted a Whirlpool monopoly in the vacuum cleaner industry, see Quality Mercury, Inc. v. Ford Motor Co., supra, at 470; Fleischmann Distilling Corp. v. Distillers Co. Ltd. [1975-1 Trade Cases ¶60,337], 395 F. Supp. 221 (S.D.N.Y. 1975); or gave Sears a market position from which it could raise retail prices even in the face of interbrand competition. See, ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977), at 93 n.380. The Whirlpool/Sears agreement should, therefore, have been examined under the rule of reason standard.

Oil Co. [1940-1943 Trade Cases ¶56,031], 310 U.S. 150,221 (1940). In its brief on rehearing en banc, Oreck refers to a so-called "edge effect," that is, that by continuing to lower its prices and thereby come closer to those of Sears, Oreck's price operated as a ceiling against any increases by Sears. Cf. United States v. Penn-Olin Chemical Company [1964 Trade Cases ¶71,147], 378 U.S. 158 at 173-74 (1964); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L.J. 373, 405-410 (1966). This claim is unavailing in the present posture of this case. Because of the trial judge's incorrect instructions to the jury, it cannot be said that the issue of whether Oreck's distributorship was allowed to lapse in order to protect Sears from price competition was fairly submitted to the jury or decided by its verdict. Rather, because the trial judge railed to instruct the jury that it must find that the purpose or the effect of these agreements was to enable Sears to raise or to main-

tain its prices for "Kenmore" vacuum cleaners, the jury's verdict that Sears and Whirlpool violated § 1 of the Sherman Act is of no effect.

[Boycott]

Oreck alleged that its cancellation, by agreement of Whirlpool and Sears, was a "group boycott" under the rule of Klor's Inc. v. Broadway-Hale Stores, Inc., supra, and of United States v. General Motors Corp., supra, which treat such behavior as a per se violation of § 1 of the Sherman Act. This case, however, cannot be fitted into the category of group boycott cases. "While the boycott concept is infinitely expandable, the per se doctrine ought not to be." Sullivan, Antitrust 256 (1977), quoted in Drayer v. Krasner, - - F.2d - - (2d Cir. Jan. 25, 1978), slip op. at 1253, 1265. It is important to distinguish between "horizontal" restraints, i.e.,

agreements between competitors at the same level of market structure, and "vertical" restraints, i.e., combinations of persons at different levels of the market structure, such as manufacturers and distributors. See United States v. Topco Associates [1972 Trade Cases ¶73,904], 405 U.S. 596, 608 (1972). Horizontal restraints alone have been characterized as "naked restraints of trade with no purpose except stifling competition," White Motor Co. v. United States [1963 Trade Cases ¶70,679], 372 U.S. 253, 263 (1963); and, therefore, per se violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products, see Continental T.V., Inc. v. GTE Sylvania,

Inc., supra, at 54. They are therefore, to be examined under the rule of reason standard. See Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term -- 1977, 77 Colum. L. Rev. 979 at 985-87 (1977).

In Klor's, the Supreme Court specifically noted that "this is not a case of . . . a manufacturer and . . . [its] dealer agreeing to an exclusive distributorship," 359 U.S. at 212. The present case, involving as it does an alleged agreement between a single manufacturer and a single dealer, is, in essence, an exclusive distributorship controversy, and the "group boycott" doctrine, is, therefore, not applicable. Because Sears is a large company presumably selling a larger number of vacuum cleaners does not, ipso facto, convert this case into a horizontal conspiracy warranting per se treatment.[6/] Cf. Continental

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6/ Oreck seeks to distinguish the line of

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cases upholding the legality of agreements by which a manufacturer substitutes one exclusive distributor for another or terminates a distributor in order to afford another exclusive selling rights, see, e.g., Quality Mercury, Inc. v. Ford Motor Co., supra; Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc. [1972 Trade Cases ¶73,918], 459 F.2d 138 (6th Cir. 1972); Alpha Distributing Co. of Calif. v. Jack Daniel Distillery [1972 Trade Cases ¶73,798], 454 F.2d 442 (9th Cir. 1972), cert. denied, 419 U.S. 842 (1974); Packard Motor Car Co. v. Webster Motor Car Co., supra; on the ground that Sears did not replace Oreck as the distributor of "Whirlpool" vacuum cleaners; and, therefore, competition of both an interbrand and intrabrand nature was eliminated.

While it is true that, because of its unique facts, this case does not fit exactly into the dealer substitution line of cases, appellee s argument does not persuade us that it therefore comes within the rule of per se illegality. It may be argued that there were alternative sources of supply available to Oreck and that the net effect of Whirlpool's decision to allow Oreck's distributorship to lapse was to add an interbrand competitor to Whirlpool-made machines in the upright vacuum cleaner market. Moreover, it appears from the record that, while Sears sold several models of Whirlpool-made vacuum cleaners under its "Kenmore" label, Oreck was allowed to market only one model under the terms of the 1968 agreement, thereby reducing the potential for intrabrand competition in Whirlpool-made machines. In the absence of a showing of an anticompetitive purpose or effect, the fact

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that Sears may have asked to be made the sole distributor of a certain line of products (in this case, Whirlpool-made vacuum cleaners), does not render Whirlpool's subsequent action in refusing to renew Oreck's distributorship illegal. Cf. Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924); Packard Motor Car Co. v. Webster Motor Car Co., supra.

The rule of reason provides a more discriminating way of differentiating true-exclusive dealerships from two-firm vertical combinations to exclude a distributor from supply. Although Oreck asserts that Whirlpool's refusal to renew its distributorship was against Whirlpool's own economic interests, the trial court's instructions to the jury, under the per se rule, did not require the jury to balance the anticompetitive evils and pro-competitive virtues of the alleged vertical Sears/Whirlpool agreement, as would have been done under the rule of reason. See Continental T.V., Inc. v. GTE Sylvania, Inc., supra, at 57 n.27; Handler Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term -- 1977, 77 Colum. L. Rev. 979 at 983 (1977). "Per se rules of illegality are appropriate only when the relate to conduct that is manifestly anticompetitive," Continental T.V., Inc. v. GTE Sylvania, Inc., supra, at 49-50; and where the conduct involved is an agreement between a single manufacturer and a single distributor which results in a sole distributorship for the manufacturer's products, a careful inquiry into the business justifications for the agreement is required.

T.V., Inc. v. GTE Sylvania, Inc., supra, at 58 n.28.

[Legitimate Business Concerns]

Moreover, in his instructions to the jury, the trial judge failed to marshal any of the evidence presented by Whirlpool to show that its refusal to renew Oreck's distributorship was motivated by legitimate business concerns[7/] and that its actions were consistent with the terms of the 1968 contract. It is the contractual nature of the dealings between Oreck and Whirlpool which distinguish this case from the holding of United States

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7/ The evidence presented at trial by both parties revealed several instances of Oreck's alleged disregard for the terms of its contract, e.g., refusal to modify advertising campaigns in accordance with Whirlpool's wishes, sales to private label customers, and failure to abide by the original marketing strategy of distribution to major retail accounts; anyone of which could have justified Whirlpool's refusal to renew Oreck's distributorship. In addition, the 1968 contract itself contained no provision for renewal.

v. General Motors Corp., supra, relied upon by Oreck. In General Motors, the Court focused on the extra-contractual and price-fixing aspects of General Motors' activities in eliciting from dealers in the Los Angeles area agreements, substantially interrelated and interdependent, that none of them would do business with price discounters. 384 U.S. at 144. The Court pointed out that what resulted from the activities of General Motors was "a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement," id. at 144; and that these activities could hardly be described as "unilateral" or merely "parallel." Id. at 145. It was this same concerted action by businessmen to boycott other traders and thereby deprive them

of access to all sources of merchandise which they wished to sell to the public, which led to the results reached in United States v. Parke, David & Co., supra; and Klor's, Inc. v. Broadway-Hale Stores, Inc., supra. Cf. Beckman v. Walter Kidde & Company [1970 Trade Cases ¶73,347], 316 F. Supp. 1321, 1327 (E.D. N.Y. 1970), aff'd [1971 Trade Cases ¶73,768], 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972).

[Contractual Rights]

What is crucial here is to consider those actions which General Motors could have taken, but did not, to discourage the sale of cars to discounters, which the Court characterized as being "wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided, in Parke, Davis, supra." United States v. General Motors, supra, at 144. After describing the

efforts of the Losor Chevrolet Dealers Association to enlist the aid of General Motors, the meetings between General Motors personnel and local dealers at which General Motors elicited from each dealer a promise not to do business with the discounters, and the collaboration among the dealers and with General Motors to enforce these promises, the Court went on to state,

> Nor did General Motors confine its activities to the contractual boundaries of its relationships with individual dealers. As the court found (Finding 39), General Motors at no time announced that it would terminate the franchise of any dealer which furnished cars to the discounters. The evidence indicates that it had no intention of acting in this unilateral fashion. On the contrary, overriding corporate policy with respect to proper dealer relations dissuaded

> General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided, in Parke, Davis, supra. (Emphasis added and footnotes omitted.) 384 U.S. at 143-144.

The General Motors Dealer Selling Agreement provided that a dealer's franchise could be terminated if the dealer attempted to establish a second and unauthorized sales outlet or location. Without deciding the question, the Court indicated that had General Motors considered that the conduct of a dealer selling to price discounters violated the terms of the Dealer Selling Agreement, it could lawfully have terminated the franchise. The Court nowhere suggests that action by General Motors in accordance with this contract would have been any less unilateral, or any less lawful, because it was

taken in response to complaints by competing dealers. Cf. Federal Trade Commission v. Raymond Bros.-Clark Company, 263 U.S. 565 (1924). Unlike General Motors, the parties in this case introduced no proof that Whirlpool took any action that was not in accord with the terms of its 1968 contract. Whirlpool contends that Oreck was fully aware that its distributorship would cease in December, 1971, regardless of whether or not its efforts to compete against Sears and other vacuum cleaner dealers were successful. The principle that unilateral refusals to deal do not per se suppress competition is not altered by the fact that the cut-off distributor has been a "successful dealer" or that its business is damaged. See Bay City-Abraham Bros, Inc. v. Estee Lauder, Inc., supra; Top-All Varieties, Inc. v. Hallmark Cards, Inc. [1969 Trade Cases ¶72,850], 301 F. Supp. 703 (S.D.N.Y. 1969).

And yet, the trial court made no attempt to balance its charge on the effect of the alleged Whirlpool/Sears conspiracy with a reference to the evidence introduced at trial that Whirlpool's decision not to renew Oreck's distributorship was an exercise of its contractual rights. It has always been the prerogative of a manufacturer to decide with whom it will deal. See United States v. Colgate & Co., 250 U.S. 300 (1919). Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire may have amounted to tortious interference; but, without some further showing that from this course of conduct there was an anticompetitive effect in the vacuum cleaner industry as a whole, it is inconsistent with the sanctity of contractual arrangements to allow the antitrust laws to inject a provision into the agreement which would require Whirlpool to renew Oreck's distributorship for as long as it is able to

compete successfully with Sears. In this case, therefore, something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown. The agreement becomes violative of ¶ 1 of the Sherman Act only if it is anti-competitive in purpose or effect -- in sum, it must be tested by the rule of reason. Without any consideration of the anticompetitive purpose or effect, arbitrarily seeking to protect Oreck simply because Whirlpool refused to renew a contract with Oreck which had terminated by its own terms, even though this refusal was in whole or in part, due to persuasion by Sears, disregards the well established rule that "the antitrust laws . . . were enacted for "the protection of competition, not competitors . . .'"

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. [1977-1 Trade Cases ¶61,255], 429 U.S. 477, 488 (1977). (Emphasis in original.)

The judgment of the district court, based

as it is on a finding of liability on the part of Whirlpool and Sears, is reversed and the case is remanded for a new trial. In so doing, we express no opinion as to the correctness of those portions of the trial court's instructions dealing with the formulation of damages.

[Dissenting Opinion]

Mansfield, Cir. J., dissenting in an opinion in which Judge Feinberg concurs:

This antitrust appeal turns on two major interlocking issues, one factual and the other legal: (1) Did Whirlpool and Sears combine and conspire to oust Oreck as a competitor of Sears in the sale of Whirlpool-made vacuum cleaners? (2) If so, should the conspiracy be treated as per se illegal? In my view both questions must be answered affirmatively. Therefore, I dissent.

The majority opinion is based on certain materially mistaken premises. It assumes (1) that the complaint charges only a general conspiracy "to exclude Oreck from the vacuum cleaner market in the United States and Canada" (Maj. Opin. p. 6690, supra), (2) that Oreck's case rested solely upon Whirlpool's failure to renew its agreement for distributorship of Whirlpool vacuum cleaners and parts, possibly as the result of "inducements by Sears" which "may have amounted to tor tious interference" (Maj. Opin. p. 6701), and (3) that the jury credited the testimony of one or two Whirlpool officers regarding Whirlpool's reasons for termination of its agreement with Oreck rather than the evidence offered by Oreck (Maj. Opin. p. 6690; n.2).

Only on the basis of these erroneous assumptions is the majority able to conclude that the termination of the Whirlpool-Oreck distributorship agreement did not constitute

a per se violation of § 1 of the Sherman Act, and that there could be no violation of that Act in the absence of proof of a restraint of "trade unreasonably in the vacuum cleaner industry in the United States and/or Canada." However, when the case is viewed in the light of (1) the issues framed by the pleadings, (2) the evidence presented at trial (including the inferences which the jury could reasonably have drawn from that evidence), and (3) the applicable principles of antitrust law as charged by the trial judge, the reversal is unwarranted.

Turning first to the complaint, the First Claim alleges essentially a conspiracy between Whirlpool and Sears to restrain Oreck from competing against Sears in the sale of Whirlpool-made vacuum cleaners, attachments and parts. It is claimed that pursuant to a written Whirlpool-Oreck distributorship agreement dated August 7, 1963, Oreck invested sub-

stantial funds, time and effort in building up a successful sales and service organization for the distribution of Whirlpool vacuum cleaners and that Oreck's success enabled it "to compete seriously" with Sears, the pre-existing and only other distributor of Whirlpool-made vacuum cleaners, which sold the cleaners under the "Kenmore" label. (Compl. ¶14). The complaint further alleges that as a result of Oreck's successful competition against Sears, Whirlpool was induced by Sears, its major distributor, to "eliminate any serious competition to Sears, Roebuck from Oreck" (¶15) and to combine and conspire with Sears "to deprive Oreck of its market for the sale of vacuum cleaners, attachments and parts under the Whirlpool name and label" (¶25). The Conspiracy was allegedly carried out by (1) forcing Oreck in 1968 to reduce its distributoship to "two Whirlpool products, one vacuum cleaner and one set of attachments to

a different vacuum cleaner," (2) limiting or cutting off from Oreck replacement parts, tools, drawings, improvements and modifications for Whirlpool vacuum cleaners, and (3) forcing or persuading suppliers not to furnish vacuum cleaner components to Oreck, all "with the intent and effect of foreclosing Oreck from numerous customers and potential customers and reducing Oreck's competition with Sears, Roebuck." (¶21). The purpose and effect of the alleged conspiracy is then stated as follows:

> 25. The purpose and effect of such contracts, combinations or conspiracies, and each of them, have been to deprive Oreck of its market for the sale of vacuum cleaners, attachments and parts under the Whirlpool name and label, and Oreck has substantially lost such market as a result of the actions referred to above.
>
> 26. The purpose and effect of such con-

> tracts, combinations or conspiracies, and each of them, have also been substantially to exclude Oreck from the market for vacuum cleaners, attachments and parts in the United States and its possessions, and to lessen competition in such market. (Emphasis added).

Thus, although the complaint includes allegations of restraint of trade in vacuum cleaners generally in the United States and Canada, it charges primarily a conspiracy to deprive Oreck of the sale of Whirlpool cleaners in competition with Sears. The case was tried on the latter basis and if the plaintiff succeeded in proving a conspiracy limited to the objective alleged in ¶25, it would be entitled to recover without proving the broader claim in ¶26 that it was excluded from the sale of vacuum cleaners of any kind in the United States. United States v. General Motors [1966 Trade Cases ¶71,750], 384 U.S. 127

(1966); Klor's, Inc. v. Broadway-Hale Stores (1959 Trade Cases ¶69,316], 359 U.S. 207 (1959); Silver v. N.Y. Stock Exchange (1963 Trade Cases ¶70,787], 373 U.S. 341, 348, n.5 (1963).

The Second Claim of the complaint (the only other pertinent claim for present purposes) adds to the foregoing allegations the charge that Sears and Whirlpool also conspired "to prevent Oreck from selling vacuum cleaners and other Whirlpool products in Canada."[1/]

1/ Insofar as the claim alleged in Count Two was presented to the jury as charging the defendants with an unlawful vertical location restriction, I agree with the majority that Continental T.V., Inc. v. GTE Sylvania, Inc. [1977-1 Trade Cases ¶61,488], 433 U.S. 36 (1977), which was not decided until almost a year after Judge Owen instructed the jury in this case, now requires trial courts to make a preliminary determination of whether a particular challenged restraint warrants per se treatment or should be judged according to the rule of reason.

Judge Owen did not make this preliminary determination. However, I do not agree with

From the outset it was recognized that Oreck could not establish an unreasonable restraint in the distribution of vacuum cleaners generally in the United States, since Whirlpool cleaners represent but a small percentage of the entire market. As a practical matter, therefore, the issue tried was whether Sears and Whirlpool had combined to restrain Oreck's competition against Sears by precluding Oreck from selling Whirlpool-made vacuum cleaners, attachments and parts. The record, which must at this stage be viewed most favorably to Oreck, Continental Ore Co. v. Union Carbide & Carbon Corp.]1962 Trade Cases ¶70,361], 370 U.S. 690 (1962), discloses more than ample evidence to establish

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the majority that Judge Owen's charge on this point necessarily prejudiced the jury's consideration of the evidence relating to Count ONe, since the jury verdict on that Count was supported by abundant evidence independent of the proof concerning Whirlpool's resistance to Oreck's desire to enter the Canadian market.

this specific and limited conspiracy. Since 1925 Sears has been the principal distributor of Whirlpool products, currently purchasing more than two-thirds of Whirlpool's total appliance production and, at the time of the events here involved, more than 90% of Whirlpool's vacuum cleaner output for resale under Sears' "Kenmore" label. In addition Sears, beginning in 1925, purchased a substantial block of Whirlpool's common stock and by 1960 became its largest single shareholder, owning 251,192 shares and usually electing one or more of its executives to Whirlpool's board of directors. Senior officers of Sears sometimes became Whirlpool executives. Sears, therefore, has been in a position to exercise considerable leverage over Whirlpool's sales and distribution policies and decisions.

Prior to the formation of Oreck in 1963, Whirlpool had periodically attempted to broaden the sales of its vacuum cleaners by

marketing them under its own brand name, but had found that its existing distribution network was inadequate and that Sears' sales of Whirlpool-manufactured vacuum cleaners at high retail prices posed a barrier to Whirlpool's entry into price competition against other brands as long as its relationship with Sears deterred it from competing against Sears in the sale of Whirlpool-made machines. As a result, Whirlpool in 1961 discontinued efforts to sell its products independently under its own name and H. Thomas Stroop, a Whirlpool executive, prepared a report entitled "Appraisal of Vacuum Cleaner Business -- RCA Whirlpool." He concluded that:

> Unlike other appliances, Sears sells their [vacuum] cleaners for as high or higher prices than major brand competition . . .
>
> Sears becomes very unhappy if RCA Whirlpool product is retailed for less than Sears product manufactured by Whirlpool. For this

> reason, we understand that it has been decided that the RCA Whirlpool brand should have retail prices comparable to Sears.
>
> Our challenge then . . . "Can we sell cleaners in volume at high retail prices . . . and if so how?" (Pl. Ex. 160.)

Thereafter, until the events giving rise to this case, Whirlpool-made vacuum cleaners were sold to the public only by Sears.

In April, 1963, Whirlpool's interest in selling its vacuum cleaners under its own brand name was revived. Jack Sparks, Vice President of Whirlpool, approached David Oreck, who prior to 1961 had been in charge of Whirlpool vacuum cleaner sales for "Bruno New York" and had been the most successful distributor of Whirlpool vacuum cleaners under its own brand name before Whirlpool discontinued such sales. Sparks and Oreck agreed that the newly formed Oreck Corporation, plaintiff-

appellee, would function as the exclusive United States distributor of Whirlpool brand vacuum cleaners. Sparks advised Oreck that he was "not to conflict with Sears, Roebuck on price" and an internal Whirlpool letter confirmed that Oreck's prices would "emphasize specialty [i.e., high-priced] selling."

Oreck soon found that it could operate profitably only by selling Whirlpool-made vacuum cleaners through direct mail or institutional supply houses, which would, by reducing or eliminating the middleman's mark-up, enable Oreck to sell competitively. Accordingly, in 1967 Oreck began a large-scale mail solicitation compaign which dramatically increased its sales of Whirlpool machines from a low in 1967 of 8,384 units to an all-time high of 78,203 units in 1971, the year Whirlpool terminated its distributorship. Oreck planned to realize its profits principally from the sale of dust bags and accessories over the

10-15 year life of the product. Despite the prospects for increased small order sales, which actually developed, three Whirlpool executives -- Jack Sparks, Sol Sweet and John Payne, Whirlpool's primary contact with Oreck all expressed disapproval of Oreck's mail order campaign, Payne advising Oreck that Whirlpool's unhappiness was attributable to the company's "other customer" (Sears), which did not like the mail solicitation. Indeed, Sid Boyar, a Sears vice-president and director who was also a director of Whirlpool, forwarded to Whirlpool an Oreck mail solicitation for sale of Whirlpool machines, with a note advising that this "type of selling gave Whirlpool a bad name." Payne also told Oreck that the "other customer [Sears[got to the head of the company [Whirlpool]." As a mail order house, Sears might be adversely affected by Oreck's solicitation of mail order business for vacuum cleaners made by

the same company (Whirlpool), which were similar in appearance and design to those sold by Sears.[2/] Moreover, although Oreck had originally concentrated on sale of the higher-priced "top-of-the-line" Whirlpool machines, after it shifted to mail order sales and sales to institutional supply houses, its prices for the Whirlpool upright units (which it sold in these markets) were lowered.

That a Whirlpool-Sears combination had been formed to stop Oreck's competition against Sears was further evidenced by events during the preceding year, 1966, when David Oreck sought to obtain Whirlpool's approval of Oreck's plan to market in Canada, where Sears operated under the name of Simpson-Sears Ltd. Whirlpool refused to make the minor changes

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2/ Indeed, despite minor differences, the machines sold by Oreck were so similar to those sold by Sears that they were characterized by an expert as "the same."

in the Whirlpool vacuum cleaner necessary to conform to Canadian Standard Association requirements, as Whirlpool had done for Sears, and Payne later wired Oreck that it could not market in Canada because Whirlpool could not "obtain a waiver to the current franchise," meaning approval by Sears.

By 1968 the Whirlpool-Sears combination was putting pressure on Oreck to force it to lessen its competition against Sears. In that year Whirlpool refused to manufacture private label vacuum cleaners for certain of Oreck's large customers, and Payne attributed the refusal to "objections from our customer . . .," which could be interpreted by the jury as obviously referring to Whirlpool's only other customer, Sears. When Oreck persisted, Payne eventually advised him that "another vacuum cleaner customer" had informed Whirlpool that "they are not interested in having another competitor in the vacuum

cleaner business." In 1969 and 1970, Whirlpool refused to make minor changes in Oreck's shipping carton to meet parcel post requirements and thereby avoid a penalty charge, even though Whirlpool had provided Sears with an acceptable box for its mail orders. Payne, who handled the matter, attributed the refusal not to engineering difficulties but to a "corporate" decision.

On December 31, 1971, despite Oreck's highest sales level since it had begun selling Whirlpool vacuum cleaners, Whirlpool terminated the Oreck distributorship. Whirlpool witnesses conceded at trial that Oreck was "doing a nice job, no question about that" and "we had no argument with the amounts he was selling." Yet, immediately following the termination, Whirlpool refused to sell Oreck 30,000 units in inventory at $30 each on a cash basis but sold them instead to third parties at $15 per unit.

The foregoing, together with other evidence and witnesses viewed by the jury, supported the jury's conclusion that Whirlpool terminated Oreck as the result of the combined efforts of Sears and Whirlpool to put an end to Oreck's competition against Sears in the sale of Whirlpool machines, including mail-order solicitation, to which Sears objected because of the possible adverse effect on its sale of Whirlpool vacuum cleaners under its own label in the United States and Canada. No substantial evidence was offered to show that Oreck was terminated for some possibly lawful reason, such as failure to increase Whirlpool sales or Whirlpool's desire to protect its trade name, other than testimony of Jack D. Sparks and John Payne that Oreck had failed to market to "major accounts." This purported rationale for the termination was understandably rejected by the jury in view of the tremendous increase in Oreck's sales

of Whirlpool cleaners from 1967 to 1971.

With the foregoing allegations and evidence before him, the trial judge instructed the jury

> [T]hat in order to recover under Count I Oreck has the burden of proving each of the following propositions:
> That Whirlpool and Sears combined or conspired to exclude Oreck from the market for Whirlpool vacuum cleaners, or from the vacuum cleaner market generally in the United States and its possessions and to lessen the competition in either of these markets.
> Two. That as a result of said combination or conspiracy Oreck was partially or wholly excluded from the vacuum cleaner market as I have described above.
> Three. That as a proximate result of said exclusion Oreck in fact suffered damage. (Emphasis supplied).[3/]

3/ It is noteworthy that no objection was made to these jury instructions at trial, nor did the defendants claim that the charge was erroneous in their appeal from the jury's verdict.

The majority contends that Judge Owen's charge was defective in that it allowed the jury to find antitrust liability on evidence that amounted to no more than "a perfectly legal exclusive distributorship." (Maj. Opin. p. 5). Judge Owen properly instructed the jury on this point. His charge states:

"The manufacturer may discontinue an exclusive distributorship or may refuse to renew an exclusive distributorship for business reasons which are sufficient to the manufacturer alone and any adverse effect such a decision may have upon the business of the distributor is immaterial in the absence of any arrangement or conspiracy restraining trade or competition." (Tr. 1839) (emphasis supplied).

On the evidence and this instruction the jury could have found that Oreck had by a preponderance of the evidence established the more specific and limited conspiracy alleged in its First Claim, namely, a combination between Whirlpool and Sears to eliminate Oreck as a competitor of Sears in the distribution of Whirlpool vacuum cleaners, parts and attachments. Indeed, the majority virtually concedes this, stating:

> Under such instructions, the jury could simply have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vacuum cleaners and, on that basis, have found them guilty (as it in fact did) of a per se violation of § 1 of the Sherman Act . . .. On the instant reconsideration en banc, the issue is whether the per se standard, under which the trial judge charged

> the jury, was appropriate in light of the nature of the alleged Whirlpool/Sears agreement. (Maj. Opin. pp. 6691-93) (Emphasis in original).

Accepting the legal issue as framed by the majority, the answer is furnished in clear and unmistakable terms by a long line of Supreme Court decisions consistently holding that where two or more competitors agree to cut off supplies to a third, such a combination or agreement to boycott is sufficiently pernicious in its purpose and effect to be unreasonable per se and hence illegal without the necessity of inquiring into the precise economic harm in the market caused by the agreement or into the amount of commerce affected. United States v. General Motors [1966 Trade Cases ¶71750], 384 U.S. 127, 145-46 (1966) (agreement between GM and its Chevrolet dealers to cut off supply to price-discounters selling Chevrolets); Klor's, Inc.

v. Broadway-Hale Stores [1959 Trade Cases ¶69,316], 359 U.S. 207 (1959) (conspiracy between one merchant and suppliers to deprive competing merchants of goods); United States v. Topco Associates, Inc. [1972 Trade Cases ¶73,904], 405 U.S. 596 (1972); Northern Pac. R. Co. v. United States [1958 Trade Cases ¶68,961], 356 U.S. 1 (1958); Fashion Originators Guild of America, Inc. v. FTC [1940-1943 Trade Cases ¶56,101], 312 U.S. 457 (1941). Such a combination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy," Klor's supra, 359 U.S. at 213 (footnote omitted).

[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their con-

duct. See Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed -- as in Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, supra, at 468. United States v. General Motors, supra, 384 U.S. at 146-47.

The present case is governed by these basic principles. The jury found that Whirlpool, a large manufacturer of appliances, including vacuum cleaners, combined with Sears, Roebuck, a merchandising giant that depended

on mail order business and had for 40-odd years distributed the lion's share of Whirlpool's entire output, to stop Oreck, the only other distributor of Whirlpool-made vacuum cleaners, from competing against Sears in the sale of Whirlpool-made machines.

Before Oreck was terminated by the Sears-Whirlpool combination as a competing distributor, the public had the benefit of Oreck's competition, including price competition, in the marketing of Whirlpool cleaners, the sales of which had been dramatically increased by Oreck from 8,384 units to 78,203 units in the preceding four years, resulting in profits to Whirlpool and Oreck.[4/] After the termination the public could buy Whirlpool machines only from Sears at such prices as Sears might decide, unaffected by any Oreck competition.

4/ Although my view of this case does not rest on Oreck's ability to compete with Sears

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pricewise, one aspect of the issue of price competition merits discussion. Oreck's initial brief on appeal strongly suggested in numerous places that the Sears-Whirlpool conspiracy was partly motivated by Sears' desire to eliminate Oreck because of the competition on prices that Oreck provided. These suggestions were not disputed by the defendants until the en banc briefs were filed.

My panel dissent mistakenly referred to Oreck's prices for Whirlpool-made vacuum cleaners as "lower" than the Sears prices for its Kenmore version of the same cleaners. The important point, however, is not which cleaners were higher-priced, but whether Sears encountered serious competition from Oreck that motivated it to prevail upon Whirlpool to terminate Oreck. The evidence showed that Oreck was a vigorous competitor, especially in the last years of its distributorship, when its sales rose dramatically. Also, it is undisputed that by 1970, 90% of Oreck's sales were from mail order solicitations, a traditional preserve of Sears.

The majority's legalization of this Whirlpool-Sears conspiracy on the theory that "something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown" (Maj. Opin. p. 6701), and that Whirlpool could lawfully have accomplished the same result by unilaterally exercising its contract right to terminate or not to renew, simply is unsupportable, either by logic or by precedent. Had Whirlpool not agreed with Sears to oust Oreck, as the jury found, Whirlpool not only could have, but probably would have, continued to distribute its product through Oreck, in view of the latter's outstanding success in selling Whirlpool cleaners during the four years immediately preceding the 1971 termination. As the jury found, the cutoff was directly attributable to the Sears-Whirlpool combination, not to any unilateral exercise by Whirlpool of its rights under its distribution contract with Oreck. The existence

of a contract right to terminate Oreck does not create a mantle of protection against an anticompetitive agreement between a manufacturer and a distributor to terminate the distributor's sole competitor.

No one questions the right of a manufacturer unilaterally to terminate a distributorship, whether it be to maximize profits, improve a distribution system, or for some other legitimate reason, see, e.g., United States v. Colgate, 250 U.S. 300 (1919), and a manufacturer is not precluded from acting on his own to substitute one exclusive distributor for another. Alpha Distributing Co. v. Jack Daniels Distillery [1972 Trade Cases ¶73,798], 454 F.2d 442, 452 (9th Cir. 1972); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd. [1969 Trade Cases ¶72,914], 416 F.2d 71, 76 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Packard Motor Car Co. v. Webster Motor Car Co. [1957 Trade Cases

¶68,682], 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); Elder-Beerman Stores Corp. v. Federated Department Stores, Inc. [1972 Trade Cases ¶73,918], 459 F.2d 138 (6th Cir. 1972). The jury was so instructed.[5/] But when the manufacturer agrees with one or more existing competitors of its distributor to cut off the distributor, as the jury found here, the resulting termination is unlawful, United States v. General Motors Corp., supra; Klor's, Inc. v. Broadway-Hale Stores, supra; E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm. [1972 Trade Cases ¶74,125], 467 F.2d 178, 186-87 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973); Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955), and cannot be saved by using an otherwise lawful means of termination to

5/ See note 3, supra.

carry out an anticompetitive agreement. See Poller v. Columbia Broadcasting System [1962 Trade Cases ¶70,228], 368 U.S. 464, 468-69 (1962).

These basic principles were accepted at trial by Whirlpool's counsel in a recorded exchange with Judge Owen regarding the instructions to be given by him to the jury:

> The Court: I understand that, but it seems to me that if the jury were to conclude that Sears and Whirlpool had conspired to terminate Oreck to rid Sears of a competitor, they have gone all the farther that they need to go.
>
> Mr. Turoff [Whirlpool's counsel]: I see now your Honor's argument. I think what you are saying is that if the jury finds that we had a conspiracy for the purpose of getting rid of Oreck, that is an unreasonable restraint of

trade. That is, I think, a correct statement of the law.

In view of the jury's finding of just such a conspiracy, no basis exists for Judge Anderson's statement (Maj. Opin. pp. 6700-01) that "Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire" may have amounted merely to "tortious interference," and that it would therefore be "inconsistent with the sanctity of contractual arrangements" to require Whirlpool to renew Oreck's distributorship. The Whirlpool-Sears agreement to "terminate Oreck's to rid Sears of a competitor" was not only a "tortious interference" but also a per se unreasonable restraint of competition. United States v. General Motors Corp., supra; Klor's, Inc. v. Broadway-Hale Stores Inc., supra.

Nor can the boycott here by legalized on the technicality that it is "vertical" because only one horizontal competitor, Sears,

was a member of the conspiracy. It is the participation of this competitor, incidentally one of the country's merchandising giants, with some 2,800 stores and sales offices, that renders illegal the boycott of Oreck by establishing that the Whirlpool-Sears agreement was anti-competitive and designed to benefit Sears at the expense of its competitor, Oreck. Once that objective was shown, the number of the conspirators and their posture -- whether vertical or horizontal -- has no legal significance. See, e.g., General Motors, supra, where the boycott depended for its success upon vertical conspiratorial efforts by one manufacturer, as here. Moreover, the harmful effect on the victim of the boycott -- in this case Oreck -- does not depend on the existence of more than one competitor but upon the anticompetitive agreement between

the competitor and the supplier.[6/]

Finally, the majority places heavy reliance on Continental T.V., Inc. v. GTE Sylvania, Inc. [1977-1 Trade Cases ¶61,488], 433 U.S. 36 (1977), which was decided approximately one year after the jury rendered its verdict in this case. In Sylvania the Supreme Court held that the potential harm from non-price vertical restrictions is insufficient to warrant as a general rule their classification as per se illegal, and that the legality of such commercial practices must be judged by a "rule of reason," unless the particular challenged practice is shown to have a "pernicious effect on competition" and

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6/ As Professor Sullivan observed in his discussion of the per se approach to group boycotts, "it is conceivable that only a single firm at the blockaded level [Sears] may succeed in coercing or inducing . . . one important supplier [Whirlpool] . . . from dealing with one or more would-be competitors "Oreck]. . . . Such an arrangement would display all essential elements of a boycott." Sullivan, Antitrust, 231, n.1 (1977).

to lack "any redeeming virtue." Northern Pac. R. Co. v. United States [1958 Trade Cases § 68,961], 356 U.S. 1, 5 (1958).

While the Sylvania holding indicates that the trend in antitrust doctrine may be toward increasing application of the rule of reason over the per se approach, the decision is largely irrelevant to this case, which involves a boycott, not a vertical restriction.

Sylvania leaves intact the justification and standard for the creation of per se rules, as articulated in Northern Pacific, supra, and the boycott in this case meets that standard. No redeeming virtue has been asserted to justify the conspiracy between Whirlpool and Sears to terminate Oreck, as found by the jury; nor has it ever been suggested that benefits to the marketplace will result from this conspiratorial termination. Moreover, the harm to intrabrand competition in the sale of Whirlpool-made vacuum cleaners is both

immediate and apparent, with no countervailing stimulation of interbrand competition, the usual saving grace of a vertical restraint.

Until the Supreme Court decides that a boycott ought not to be evaluated according to the per se rule, I would hold that a combination or conspiracy of two or more persons or entities to eliminate a competitor is per se illegal under § 1 of the Sherman Act. The jury's conclusion that such a conspiracy existed in this case is supported by the evidence. Therefore, I would affirm.

Opposition

FILED
OCT 28 1981
ALEXANDER L. STEVAS

No. 81-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORECK CORPORATION,

Petitioner,

v.

WHIRLPOOL CORPORATION,

and

SEARS, ROEBUCK AND CO.,

Respondents.

BRIEF OF RESPONDENT SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 26, 1981

Pandick Press Midwest, Inc., Chicago • 454-7600

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ORECK CORPORATION,

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SEARS, ROEBUCK AND CO.,

Respondents.

BRIEF OF RESPONDENT SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Sears, Roebuck and Co. ("Sears")[1] submits this brief in opposition to the petition of Oreck Corporation ("Oreck") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered November 4, 1980.

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[1] Sears' statement pursuant to Supreme Court Rule 28.1 is contained in the Appendix attached hereto.

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

In this anti-trust action, filed in 1972, plaintiff Oreck alleged, but was unable to prove, a conspiracy between defendants Sears and Whirlpool Corporation ("Whirlpool") to terminate Oreck's distributorship of Whirlpool brand vacuum cleaners and to exclude Oreck from the vacuum cleaner market in violation of the Sherman Act. (15 U. S. C. § 1.)

After a jury verdict in favor of Oreck at the first trial, the Court of Appeals reversed and remanded for a new trial. 563 F. 2d 54 (2d Cir., 1977), *reh. en banc,* 579 F. 2d 126 (2d Cir. 1978), *cert. denied,* 439 U. S. 946 (1978). At the conclusion of plaintiff's case at the second trial, the district court granted defendants' motion for a directed verdict on the ground that plaintiff had failed to prove that defendants' conduct was anticompetitive. On appeal, the Court of Appeals found a "complete lack of independent evidence of a conspiracy involving Sears" and affirmed the judgment of the district court on the grounds of insufficient evidence to establish a conspiracy between Sears and Whirlpool.[2] It did not review the district court's decision that plaintiff had failed to prove an unreasonable restraint of trade in the vacuum cleaner industry.

The decisions of both the district court and the Court of Appeals were correct and should not be disturbed. The Court of Appeals' decision is in accord with the decisions of this Court and the Circuit Courts relating to the quantum of proof required in anti-trust conspiracy cases. Further, the Court of Appeals' earlier decision directing the district court to test defendants' alleged conduct under the rule of reason is con-

[2] The previous opinions of the Court of Appeals, after the first trial, did not reach the question of the sufficiency of the evidence of a conspiracy. *Oreck Corp.* v. *Whirlpool Corp.*, 639 F. 2d 75, 79 fn. 2.

sistent with existing antitrust case law. The issues presented by Oreck's Petition, that is, whether the district court and the Court of Appeals correctly concluded that plaintiff failed to prove either a conspiracy between the defendants or an unreasonable restraint of trade, are not issues which require this Court's review.

B. The Facts

As the record facts demonstrate, plaintiff presented no competent evidence of acts or statements by Sears evidencing its involvement in a conspiracy to terminate Oreck's distributorship.

From 1957 onward, Sears has continuously purchased vacuum cleaners from Whirlpool which Sears sells under its "Kenmore" label. (JA. 647-648). Sears owned less than 5% of Whirlpool's stock and an officer of Sears sat on Whirlpool's Board of Directors. (JA. 641, 644). Between 1957 and 1961 Whirlpool also marketed vacuums under the "Whirlpool" brand name through its own distribution system. In 1961 Whirlpool ceased selling its own brand vacuums, having failed to achieve a significant share of the market. It nevertheless continued manufacturing vacuum cleaners for Sears [PX 13 (E. 17-18), PX 13A (E. 19-21), JA. 564-565].

In 1963, Whirlpool again attempted to market its own brand of vacuum cleaners, and designated plaintiff Oreck as its exclusive national distributor under a five year written contract. [PX 3 (E. 1-9), T. 71]. Whirlpool hoped to re-enter the market by establishing a distribution system through department stores and other key accounts, which system would have been in direct competition with Sears [PX 10 (E. 10-14), PX 13 (E. 17-18), PX 13A (E. 19-21), JA. 569-570, 600-601]. Certain tooling, owned by Sears and used by Whirlpool to manufacture vacuums for Sears, was needed for the production of the Whirlpool brand vacuums for Oreck. Sears was asked for and consented to the use of its tooling, in return for a tool

rental fee. Sears thereafter permitted its tooling to be used for Oreck during Oreck's entire relationship with Whirlpool (JA. 622-623, 746-748, 1033).

From the inception of the Oreck distributorship in 1963 and until 1968, when Whirlpool gave notice to Oreck of its intention not to renew the distributorship contract, Sears had no involvement in the Whirlpool-Oreck relationship, other than permitting its tooling to be used for Oreck. No evidence was presented by plaintiff of any actions by Sears or of any written or oral communications between either Sears and Whirlpool or Sears and Oreck concerning the Oreck distributorship, or its expiration.

In response to Whirlpool's unilateral decision in 1968 not to renew the distributorship, Oreck pleaded for additional time to recoup its investment and threatened legal action if it did not receive an extension (JA. 316-317, 653). In response, Whirlpool acquiesced to a three year extension and entered into a new agreement to expire by its terms on December 31, 1971 [PX 44A (E. 40-47)]. There was no evidence that Sears was consulted with respect to this extension.

Thereafter, Oreck blanketed the country with high-pressure mailings offering Whirlpool vacuum cleaners at a phony "half price", and replete with numerous other admittedly false representations (JA. 279-282, 486-487, 490-492). In 1971 alone, Oreck dispatched some twenty million pieces of mail to persons whose names happened to appear on various mailing lists (JA. 839). Many complaints were received by Whirlpool and Oreck from consumers and others, including the Better Business Bureau, as a result of Oreck's mass mailings (JA. 285-287, 492-493, 496). Among those who complained about the mailers and the use of the Whirlpool name in connection therewith was a retired director of Sears. In 1971 he received an Oreck mailer as a member of some fictitious

"consumer test group". He noted that he was not a member of any such group and that he believed the mailers hurt Whirlpool's image and looked like a "come on" (JA. 1038, First trial PX 60, A. 830-831). A few other mailers, received by Sears employees, were also forwarded on to Whirlpool for its information and without comment (JA. 1032).

Oreck's contract with Whirlpool expired by its own terms on December 31, 1971. Whirlpool declined to extend the distributorship [PX 96 (E. 68)] and was thereafter compelled to sue Oreck for unpaid bills (JA. 415-418, 479).

After expiration of its distributorship, Oreck obtained alternate sources of supply and achieved sales success for an "Oreck" brand vacuum [PX 881 (E. 501), JA. 427, 429-431, 446-448]. Today it describes itself as "the world's largest seller of top-fill uprights" [DX U (E. 520-525), DX 00 (E. 536-542)].

Oreck presented no admissible evidence of any acts or communications by Sears during the last three years of the distributorship other than Sears forwarding to Whirlpool of some Oreck mailers, hardly a fact from which a jury should be permitted to infer a conspiracy.

SUMMARY OF ARGUMENT

Plaintiff failed to prove a conspiracy between defendants. There is no evidence of even a single communication between defendants concerning Oreck's distributorship or its termination. Indeed, the evidence establishes no involvement on Sears' part with respect to Oreck except that Sears allowed its tooling to be used by Whirlpool to manufacture vacuum cleaners for Oreck.

Oreck should not be permitted to avoid its burden of proving an anticompetitive effect on the market, a burden which it has not been able to carry. Oreck introduced no evidence of any effect on competition. Indeed, Oreck's numerous admissions which demonstrate there was no impact on competition resulting from the expiration of its distributorship are themselves sufficient to mandate denial of its petition.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Evidence Presented in the District Court Was Insufficient to Establish a Contract, Combination or Conspiracy Between Whirlpool and Sears and the Court of Appeals Properly Affirmed the Directed Verdict in Favor of the Defendants

Oreck failed to prove any independent statement or action of Sears from which it could be inferred that Oreck's distributorship was terminated pursuant to a conspiracy or agreement between Whirlpool and Sears. The record merely discloses that Sears is a shareholder of Whirlpool and one of its officers sits on Whirlpool's board of directors (JA. 578, 587, 641, 645-646, 652, 1035, 1036). From 1957 onward Sears was Whirlpool's largest customer for vacuum cleaners as well as other household appliances. When Whirlpool entered into its first contract with Oreck in 1963, Sears voiced no objection. To the contrary, Sears authorized Whirlpool to use tooling owned by Sears to make vacuum cleaners for Oreck. Sears never rescinded that authorization (JA. 743-745, 760-761 1037-1038). When Oreck began inundating the mails with its high pressure and misleading mailings in the last three years of its distributorship, several pieces, among the millions mailed by Oreck, were received by some of Sears personnel, who passed them on to Whirlpool for its information, without comment (JA. 1032).

The foregoing is the sum and substance of the independent proof received in evidence against Sears. It falls far short of evidence of any conspiracy.[3]

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[3] Although there was no independent proof of Sears' involvement in a conspiracy with Whirlpool, the district court erroneously permitted hearsay testimony by Oreck's officers regarding alleged statements made by a Whirlpool salesman regarding Sears. In so doing, the trial judge characterized the independent evidence of conspiracy as "scanty." The Court of Appeals described that charac-

(Footnote continued on following page.)

The close and long-standing relationship between Sears and Whirlpool, as customer and supplier, and the frequent meetings and communications between their respective personnel, none of which were shown to have concerned Oreck, are not proof of any conspiratorial conduct. Close relationships, contacts and meetings are not sufficient, standing alone, to permit a jury to infer illegal agreement. *Venzie Corp.* v. *United States Mineral Products Co., Inc.*, 521 F. 2d 1309, 1312-1313 (3d Cir. 1975). The mere fact that Sears might have had the economic power to influence Whirlpool to terminate its relationship with Oreck had it so desired is not proof that Sears actually exercised that power.

Similarly, no inference of conspiracy can be drawn from the fact that Sears personnel forwarded a few of Oreck's shoddy and misleading mailers to Whirlpool. This is especially true because Sears, a shareholder of Whirlpool, had an unquestionable right and a legitimate interest in advising Whirlpool of business tactics which might adversely affect Whirlpool's name and reputation.

Moreover, even if Sears' acts are erroneously interpreted as being objections to Oreck's shoddy mailings and selling tactics, such objections were appropriate and lawful. As the Second Circuit correctly concluded, complaints by one customer about another customer do not support an inference of a conspiracy under the Sherman Act. 639 F. 2d at 80. *See also, Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 111 (3d Cir. 1980), *cert. denied*, ___ U. S. ___ (1981), *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F. 2d

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(Footnote continued from preceding page.)

terization as "overly generous" and correctly held that because of the total absence of prior independent proof of conspiracy such statements were inadmissible. 639 F. 2d at 80-81. The Court also noted that these alleged statements were probably inadmissible in any event because of plaintiff's failure to lay a proper evidentiary foundation, and that, even if admitted, they would have had "little probative value." *Id.* at 80 fn. 3.

668, 675 (9th Cir. 1975), *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S. D. N. Y. 1968); *Garrett's, Inc.* v. *Farah Manufacturing Co., Inc.*, 412 F. Supp. 656, 660, fn. 3 (D. S. C. 1976).

Defendants' tooling arrangements do not support, but actually negate, an inference of a conspiracy. In 1963, when Whirlpool entered into its agreement with Oreck, Sears agreed to permit Whirlpool to use Sears' tooling to manufacture Whirlpool brand vacuum cleaners for Oreck. Sears had no legal obligation to permit Oreck, a competitor, to use its tooling. Thus, Sears' acts were not only proper and lawful, but, in fact, assisted Whirlpool and Oreck in their venture. At no time throughout Oreck's eight year relationship with Whirlpool did Sears withdraw its permission to use its tooling.

Apparently recognizing that the foregoing is insufficient to prove Sears' participation in a conspiracy, Oreck claims that Sears had a motive to conspire with Whirlpool. But Sears' subjective motives are not proof of its involvement in any conspiracy. *Dart Drug Corp.* v. *Parke, Davis & Co.*, 344 F. 2d 173, 186 (D.C. Cir. 1965)

Moreover, there is no evidence from which improper motive can be inferred. For instance, Oreck now attempts, after nine years of litigation, to reverse its position, and posture itself as a price-cutter. It argues, without any foundation, that its "low price mail order strategy" prompted Sears to complain to Whirlpool and led to the ultimate termination of the distributorship (See pages 10-11 of Oreck's petition). This claim is totally contrary to the allegations of its complaint, which alleges that Sears sold vacuums at prices below those which Oreck charged. [Complaint, ¶ 41 (E.24)] Indeed, following the first trial, the Court of Appeals, in its *en banc* decision, concluded that "it is undisputed that, at all times relevant, Sears was selling its 'Kenmore' vacuum cleaners at prices *below* those charged by Oreck for comparable 'Whirlpool' models". (579 F.2d at 130, emphasis in original). At the second trial Oreck

failed to prove it ever undercut Sears on the price of vacuum cleaners. 639 F.2d at 78. The present attempt by Oreck, after two trials, to ignore the allegations of its own complaint, and to change the "undisputed" facts to suit its requirements of the moment, should be summarily rejected.

Under the terms of Oreck's contracts with Whirlpool, Oreck had the *sole right* to determine its own pricing, which it did without interference. There is no evidence that during the eight years of Oreck's distributorship, Sears ever communicated with Whirlpool about Oreck's pricing.

Oreck places great weight upon the so-called Stroop Report [PX 160 (E. 79-121)] to show Sears' concern about Whirlpool's pricing of Whirlpool brand vacuum cleaner. That document, which is dated October 16, 1961 and pre-dates the Oreck-Whirlpool relationship by several years, is hearsay as to Sears, and was not received in evidence against it (T. 63-64). Additionally, there is no evidence that the document was anything but one Whirlpool employee's unilateral evaluation in 1961 of Sears' attitude, that it accurately reflected anything ever said or done by any specific Sears' personnel or that Sears had the same attitude in 1971 when Oreck's distributorship expired.

Likewise, the record does not support Oreck's contention "that between 1967-71 Oreck's mail order sales at discount prices increased sharply at a time when Sears' mail order sales of upright units were plunging." This assertion is misleading and inaccurate because Oreck offered no evidence that any increase in its sales caused a decrease in Sears' sales, that Oreck's sales had any special relationship to Sears' sales out of all the brands on the market, or that the sales of other sellers were not also fluctuating at the same time.

Additionally, Oreck has incorrectly equated Sears' mail order sales with Sears' catalog sales. However, Sears' catalog sales are not primarily mail order sales. Only a small part of Sears' catalog sales are made by mail order and about 95% of

Sears' catalog sales are made by telephone and in person at its 872 retail stores, and its 1,505 catalog, retail and telephone sales offices, and through its 805 authorized catalog sales merchants [PX 633 (E. 254-257), JA. 225, 716-717, 754]. There is thus no basis for any inference that there was something special about Oreck's sales methods to make Sears select Oreck from all other sellers in the market as a particular competitive threat.

In summary, Oreck's present argument that it was terminated as a Whirlpool distributor because of its supposed price-cutting activities is contrary to the allegations of its complaint, the position which it has taken throughout nine years of this litigation, and the evidence presented by it in two trials.

The Court of Appeals' decision that there was insufficient evidence of concerted action between Sears and Whirlpool is consistent with the decisions of this Court on proof of antitrust conspiracy. Nevertheless, Oreck erroneously contends that the Court of Appeals ignored *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946) and *Continental Ore Co.* v. *Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962). But, in *American Tobacco* and *Continental Ore,* specific proof of the defendants' common actions in restraint of trade was presented to the jury. Here, there is no proof of either "common actions" of defendants or even any specific acts of Sears from which any reasonable inference of an agreement with Whirlpool can be drawn.

Oreck also incorrectly argues that the Court of Appeals decision is inconsistent with *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962). That case concerned a complaint that CBS cancelled the network affiliation of plaintiff's television station pursuant to a conspiracy to restrain trade in the Milwaukee television market. This Court reversed summary judgment in favor of defendants, because the record disclosed meetings and communications between the alleged conspirators relating to the ownership and affiliation of the

plaintiff's station and the elimination of independent UHF stations. There is no evidence here of any meetings or communications concerning Oreck's distributorship or its expiration. All Sears did was to allow its tools to be used and forward some Oreck mailers to Whirlpool.

Oreck contends that conduct contrary to economic self-interest is, along with motive, one of the two "critical" elements of conspiracy proof. In the instant case there was no proof of *any* acts by Sears against its economic interest. Whirlpool's actions, even if the evidence had shown them to be against its own economic self-interest, are not proof as against Sears of involvement in a conspiracy. *See, Riss & Co., Inc.* v. *Association of American Railroads,* 187 F. Supp. 306 (D. D. C. 1960), *Rutledge* v. *Electric Hose & Rubber Co.,* 327 F. Supp. 1267 (C. D. Cal. 1971), *aff'd,* 511 F. 2d 668 (9th Cir. 1975).

Oreck has been unable to prove illegality even after two trials. None of the authorities or arguments relied upon by Oreck justifies its total failure to present competent independent conspiracy proof binding upon Sears. Accordingly, the directed verdict for defendants was proper and should not be disturbed.

The District Court Properly Directed a Verdict for Defendants Based Upon Plaintiff's Failure to Prove an Unreasonable Restraint of Trade

The Court of Appeals, in its *en banc* decision remanding this case for retrial (579 F. 2d at 133-134), held that in order for plaintiff to succeed at the new trial it must prove (i) an agreement or conspiracy, and (ii), an unreasonable restraint of trade. As was shown above, upon retrial plaintiff introduced no competent evidence that Whirlpool and Sears conspired to exclude it from the vacuum cleaner market in the United States.[4] However, even assuming, *arguendo,* the existence of a

[4] Plaintiff abandoned its claim that it has been excluded from the Canadian market (JA. 1047-1048).

conspiracy, plaintiff failed, as it did at the first trial, to prove any effect on competition. This point is discussed extensively in the Whirlpool brief and Sears adopts that discussion. However, it is important to note that at the conclusion of plaintiff's case, Oreck's attorney admitted that: the expiration of Oreck's agreement with Whirlpool had no effect on the vacuum cleaner industry as a whole; Oreck was not driven out of the vacuum cleaner business and that the defendants did not conspire to do so; defendants could not have driven Oreck out of the vacuum cleaner business even had they so desired; Sears could not maintain its prices at artificially high levels even if Oreck had been eliminated as a competitor;[5] the defendants did not conspire to create a monopoly; defendants' acts had no effect on the supply of vacuum cleaners to consumers; defendants had no power to control prices in the market; and Whirlpool never threatened to cut Oreck off for cutting prices (JA. 1093-1097, 1106-1107, 1128, 1136). Thus, at best, Oreck's complaints concern alleged injury to it, not to competition, and such injury is insufficient to sustain an anti-trust verdict. *See, Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488 (1977).

[5] The record is clear that there never was any intrabrand competition between Sears and Oreck 639 F. 2d at 78.

CONCLUSION

At trial, plaintiff failed to prove either a conspiracy or an unreasonable restraint of trade in violation of the antitrust laws. The district court and the Court of Appeals properly concluded that a verdict should be directed for defendants.

Under the facts of this case, there are no issues of antitrust law relating to proof of conspiracy or unreasonable restraint of trade which require this Court's attention.

Plaintiff's attempt to raise new issues by posturing itself as a distributor who was terminated because of its pricing activities should not be condoned. After nine years of litigation and two trials, this case should be put to rest. Plaintiff has had more than a fair opportunity to prove a case, which it has failed to do. The Writ of Certiorari should not be granted.

Respectfully submitted,

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October 26, 1981

APPENDIX

APPENDIX

Pursuant to Supreme Court Rule 28.1, the following are those companies which are subsidiaries or affiliates of Sears, Roebuck and Co. Sears has no parent company.

A. WHOLLY OWNED AND MAJORITY OWNED COMPANIES

AEMC Transferee Corp.
Allfinanz Vermoegensberatung und Versicherungsvermittlung A G (Germany)
Allstate Development Corporation
Allstate Enterprises, Inc.
Allstate Enterprises Consumer Discount Company
Allstate Enterprises Financial Corporation
Allstate Enterprises Financial Corporation of Iowa
Allstate Enterprises Financial Corporation of Tennessee
Allstate Enterprises Management Company
Allstate Enterprises Mortgage Corporation
Allstate Financial Corporation
Allstate Indemnity Company
Allstate Insurance Company
Allstate Insurance Company of Canada
Allstate Insurance Holdings Ltd. (United Kingdom)
Allstate International Inc.
Allstate International S. A. (Switzerland)
Allstate International Verwaltungs GmbH (Germany)
Allstate Investment Management Company (1)
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Motor Club, Inc.
Allstate Reinsurance Company (Belgium) (1)
Allstate Reinsurance Company (U.K.) (Limited)
Allstate Savings and Loan Association
Allstate Trading Company
Alstadt Versicherungs A. G. (Switzerland)
Assumair Assurantien B.V. (Netherlands)

Avia Nautica B.V. (Netherlands)
Banco de Credito Internacional, S. A. (Panama)
Capitol Service Corporation
Columbia Escrow Company, Inc.
Development Science Services, Inc.
Europa Krankenversicherung A G (Germany)
Europa Lebensversicherung A G (Germany)
Europa Sachversicherung A G (Germany)
Europa Versicherungen Datenverarbeitung GmbH (Germany)
Executrans, Inc.
Executrans Canada Ltd.
Exec-Van Systems, Inc.
Federated Insurance Company Ltd. (England)
Fleet Maintenance, Inc.
Gellman Research Associates, Inc.
General Underwriters Agency, Inc.
Golightly & Co. International, Inc.
Greenbriar Mall Venture (2)
Harbridge House, Inc.
Harbridge House SARL (France)
Homart Development Co.
Immobiliaria Sears, C.A. (Venezuela)
Inglis Limited
Ingress Manufacturing Co., Inc.
Jackson Properties (2)
Kro-Mar Associates Limited Partnership
Kro-Mar Incorporated
Les Estimations Claude Vanier Inc.
Lifetime Foam Products, Inc.
Northbrook Excess and Surplus Insurance Company (3)
Northbrook Indemnity Company
Northbrook Life Insurance Company
Northbrook National Insurance Company

Northbrook Property and Casualty Insurance Company (4)
Pacific Installers, Inc.
PMI Insurance Co. (5)
PMI Mortgage Corporation
PMI Mortgage Insurance Co.
PMI Securities Co.
Rotterdam Data Processing B.V. (Netherlands)
Safe-T-Lawn, Inc.
Schirmer Engineering Corporation
Sears Driving School, Inc.
Sears Finance Corp. (1)
Sears International Finance Co.
Sears Investment Management Co.
Sears Overseas Finance, N. V. (Netherlands Antilles)
Sears Roebuck Acceptance Corp.
Sears, Roebuck and Co. B.V. (Netherlands)
Sears, Roebuck and Co. GmbH (Germany)
Sears, Roebuck Servicios de Chile Limitada
Sears, Roebuck S. A. (Central America)
Sears, Roebuck S. A. Comercial e Industrial (Argentina)
Sears, Roebuck S. A. Comercio e Industria (Brazil)
Sears, Roebuck de Espana, S. A. (Spain)
Sears, Roebuck del Peru S. A. (Peru)
Sears, Roebuck de Mexico, S. A. de C. V. (Mexico)
Sears, Roebuck de Portugal, Ltda. (Portugal)
Sears, Roebuck de Puerto Rico, Inc.
Sears, Roebuck de Venezuela, S. A. (Venezuela)
Sears, Roebuck d'Italia, S.P.A. (Italy)
Sears, Roebuck International, Inc.
Sears, Roebuck Limited (England)
Sears, Roebuck Overseas, Inc.
Sears, Roebuck Pty. Limited (Australia)
Sears Securities Sales, Inc.
Sears Servicos Tecnicos S/C Ltda. (Brazil)

Seraco Enterprises, Inc.
Servisears—Prestadora de Servicos Ltda. (Brazil)

B. FIFTY PER CENT OWNED COMPANIES

Altamonte Mall (2)
Bay Mart Assoc. (2)
Chapel Hill Assoc. (2)
Clearview Mall Co. (2)
Coeur D'Alene Associates
Cranberry Mall Co. (2)
Great Hills Mall (2)
Greenwood Mall Assoc. (2)
Havenbrook Assoc. (2)
Homart-Boynton Assoc. (2)
Housing Unlimited-Allstate
Lake Hodges Development Co.
Lakeside Center Assoc. (2)
Louisville Assoc. (2)
New Mart Assoc. (2)
New Park Assoc. (2)
Novi Associates (2)
The National Tag Company
Mercer Mall Company (2)
River Valley Assoc. (2)
Salisbury Associates (2)
Seibu Allstate Life Insurance Company, Ltd. (Japan)
Webster Assoc. (2)
Westgate Assoc. (2)
Wilson-Homart Assoc. (2)
Woodfield Assoc. (2)

C. LESS THAN FIFTY PER CENT OWNED COMPANIES, A CLASS OF VOTING SECURITIES OF WHICH IS OWNED

Actmedia, Inc.
Acuna-Ropa, S. A.
Allsheer, Inc. (1)

Allstate Service Stations, Ltd. (Canada)
American Waterproofing Corporation
Apcom, Inc.
Applied Technology Management, Ltd.
Arizona Public Service Co.
Ashley's The Outlet Store, Inc.
Aquarius Plastics Corporation (1)
Bannister Mall Co. (2)
Baron Data Systems
Black Hills Power & Light Co.
Bonded Fibre Products (Southern) Ltd.
Brae Corporation
Calcasieu Chemical Corporation
Carrefour Richelieu Realties Ltd.
Central Illinois Light Company
Central Illinois Public Service Co.
Central Telephone Company
Centre Commerciaux Regionaux du Quebec Ltee. (2)
Centro Comercial Plaza Satelite (Trust) (Mexico)
Centro Comercial Plaza Universidad (Trust) (Mexico)
Centro Comercial Propatria, C.A. (Venezuela)
Coldwell, Banker & Company
Commerce Consolidators Corporation
Commonwealth Edison
Computer Printers International, Inc. (6)
Condelic House Ltd.
Consumers Power Company
Contill Realty Ltd. (Canada)
Conver Corporation
Cornwall Square Development
Dart Transportation Service
Dart Warehouse Corporation
Dart Equipment Corporation
Delta Data Systems Corporation

DeSoto, Inc.
DeSoto Coatings, Ltd.
Dover Associates (2)
Duquesne Light Company
Eastgate Company (2)
Elmhurst Maintenance, Inc.
Equatorial Communications Company
Form-O-Uth, Inc.
Form-O-Uth de El Salvador, S.A. de C.V.
Fruitbelt Motor Service, Inc. (Ill.)
GradeMark, Ltd.
GradeMark of Los Angeles, Ltd.
Grimsby Stove and Furnace Ltd. (Canada)
Harold Williams (1964) Ltd.
Homan Services, Inc.
Houdaille Industries, Inc.
Hot Springs Mall Assoc. (2)
Huntsville Assoc. (2)
Hurco Manufacturing Company, Inc.
Industrial Data Terminals Corporation
Industrias Vematec, S.A. (Venezuela)
International Communications Sciences, Inc.
International Video Corporation
Iowa Illinois Gas and Electric Co.
Ivan, Kerry (2)
John Rennie Ltd. (Canada)
John Rennie Industries, Ltd. (Canada)
Justinian Developments Ltd.
Kansas Gas and Electric Company
Kelfor Holding Ltd. (Canada)
Kellwood Company
Kellwood International, Inc.
Kellwood International Limited
Kellwood Nicaragua S. A., Inc.

Keltyboots, Inc. (1)
Kelty Pack, Inc.
Kenmore Restaurants, Ltd. (Canada)
Kerrybrooke Development Ltd. (Canada)
Kerrytor Ltd.
Kingsway Imports Ltd. (Canada)
KWD Fiber-Lite Inc. (1)
Lafayette Assoc. (2)
Lawndale Packaging Corporation
Leaseway Warehouses, Inc.
Manchester Manufacturing Inc.
Markham Marketplace (2)
Matemexico, S.A. de C.V.
Maul Technology Corp.
Metromail Corporation
Micro-Mex, S. A. de C. V.
Mildoman Place Winnipeg (2)
Minnesota Power and Light
Monterey Mills, Inc.
Monterey Mills of Tennessee, Inc.
Mountain Fuel Supply Company
National Physical Distribution Consultants, Inc.
Neighborhood TV Company
Newpark Plaza Assoc.
Newsub Co.
Nicor, Inc.
Pacific Power and Light
Pennsylvania Power & Light Company
Peoples Energy

D. LESS THAN FIFTY PER CENT OWNED COMPANIES, A CLASS OF VOTING SECURITIES OF WHICH IS OWNED BY SEARS OR AFFILIATED COMPANIES IN AN AMOUNT OF 10-49%

Perry Manufacturing Company
Photo Engravers and Electrotypers Limited (Canada)

Pine Centre Mall (2)
Place Vertu (2)
Place Beauport (2)
Public Service of Indiana
Project 200 Properties Ltd. (Canada)
Quetor Realty Ltd. (Canada)
Quilted Textiles Corporation
Regbrooke Ltd.
Regional Shopping Centre Ltd. (Canada) (2)
Regional Shopping Centres (Canada) Ltd.
Rey-Mex Bra, S.A. de C.V.
Roper Canada Limited
Roper Corporation
Roper International Sales Corp.
Sanyo Manufacturing Corporation
Sarama Lighting of Massachusetts, Inc.
Seguros del Atlantico, S.A. (Mexico)
Signal Delivery Service, Inc.
Simpsons-Sears Limited (Canada)
Simpsons-Sears Acceptance Co., Ltd. (Canada)
Simpsons-Sears Properties Ltd. (Canada)
Smart Shirts Limited
Southern California Edison Company
Southern Connecticut Gas Company
Stahl-Urban Company
Star Quilters, Inc.
State Industries, Inc.
St. Laurent Shopping Center Ltd. (Canada)
Supervised Parking (Ontario) Ltd. (Canada)
Surrey Place Ltd. (Canada)
Swift Textiles, Inc.
Swift Textiles (DISC) Corporation
Textile Fibre Associates, Inc.
Thermasol, Ltd.

Titan Wood Products Limited

Tri-W Corporation

Union Electric Company

Unity Oil Inc.

Vantor Realty Ltd. (Canada)

Wadsworth Control Systems, Inc.

Welsbach Concrete Systems Corp.

Wenzel Company, The

Western Pennsylvania Water Company

Wintor Realty Ltd. (Canada)

Woodridge Center (2)

FOOTNOTES

* Non-Voting Shares

(1) Inactive Company during entire year

(2) Partnerships and Quasi Corporations

(3) Formerly: Northbrook Insurance Company

(4) Formerly: Allstate Fire Insurance Company

(5) Formerly: PMI Mortgage Insurance Co. of California

(6) Formerly: Termco, Inc.

Opposition

2

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORECK CORPORATION,

Petitioner,

v.

WHIRLPOOL CORPORATION,

and

SEARS, ROEBUCK AND CO.,

Respondents.

BRIEF OF RESPONDENT WHIRLPOOL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pandick Press Midwest, Inc., Chicago • 454-7600

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether under the rule of reason defendants were required to justify their conduct when plaintiff admittedly failed to prove that such conduct had any effect on competition.

2. Whether certiorari should be granted to determine whether the Second Circuit correctly evaluated the facts when it held that plaintiff had failed to prove a conspiracy.

IN THE

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OCTOBER TERM, 1981

ORECK CORPORATION,

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BRIEF OF RESPONDENT WHIRLPOOL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Introduction

Oreck Corporation ("Oreck"), a former distributor of "Whirlpool" brand vacuum cleaners, filed this anti-trust action claiming that Whirlpool Corporation ("Whirlpool"),[1] a

[1] Whirlpool Corporation has no parent company. Its non-wholly-owned subsidiaries and affiliates include Brastemp, S.A., Inglis, Ltd., Thomex S.A. de C.V., Empresa Brasileira de Compressores S.A. and Industria de Refrigeracao Consul S.A. Supreme Court Rule 28.1.

vacuum cleaner manufacturer, and Sears, Roebuck and Co. ("Sears"), a retailer of "Kenmore" brand vacuum cleaners, conspired to exclude it from the market for the sale of vacuum cleaners in the United States in violation of Section 1 of the Sherman Act. (15 U. S. C. § 1).

After a jury returned a verdict in favor of Oreck, the United States Court of Appeals for the Second Circuit reversed and ordered a new trial. *Oreck Corp.* v. *Whirlpool Corp.*, 563 F. 2d 54 (2d Cir. 1977). It found there was:

> "... *no* evidence or testimony that the net economic effect of Oreck's cancellation was unreasonably to restrain trade in the vacuum cleaner industry in the United States ...." *Id.* at 56 (emphasis in original).

It also rejected Oreck's claim that the termination of its "Whirlpool" distributorship was motivated by alleged price competition with Sears. The court stated:

> "... Oreck has neither charged nor proven a conspiracy to fix prices for Whirlpool vacuum cleaners. Nowhere in the complaint does Oreck allege that Whirlpool's refusal to deal was aimed at eliminating intrabrand price competition. The inappropriateness of any claim of price-fixing is made even more clear by the fact that Sears markets its vacuum cleaners under the "Kenmore" label. Oreck's exclusive distributorship of vacuum cleaners under the "Whirlpool" label would not, from the point of view of the public consumer, have any particular effect on competition with machines sold by Sears." *Id.* at 59.

The Second Circuit granted rehearing *en banc* and affirmed the panel's decision.[2] 579 F. 2d 126 (1978). It likewise concluded there was no evidence of an unreasonable restraint of trade. *Id.* at 128. It also found there was no evidence of

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[2] Neither the panel nor the *en banc* court addressed the issue of whether Oreck had proved a conspiracy. *See* 639 F. 2d 75, 79, n. 2

either a group boycott or price-fixing. Reviewing the evidence, the *en banc* court stated, at page 130:

> "... It is undisputed that, at all times revelant, Sears was selling its "Kenmore" vacuum cleaners at prices *below* those charged by Oreck for comparable "Whirlpool" models. The complaint did not allege, the evidence at the trial did not show, and counsel in summation did not argue, that Whirlpool was attempting to maintain high resale prices for its products by conspiring with its distributors or that its actions toward Oreck were an effort to chastise a dealer for refusing to cooperate in a scheme to fix or maintain prices." (emphasis added)

After this Court denied certiorari [439 U. S. 946 (1978)], the case was retried. At the close of its evidence plaintiff *admitted* (JA. 1093-1097, 1106-1107, 1128, 1136) that defendants' alleged actions had no effect of any kind on the vacuum cleaner industry, that there was no conspiracy to drive Oreck out of the vacuum cleaner business and that defendants could not have done so even if they had tried, that the alleged conspiracy between defendants was not designed to create a monopoly, that neither defendant had any power to control prices in the market or to raise them as a result of their alleged conduct, and that there had been no effect on the supply of vacuum cleaners to consumers. The trial court then directed a verdict in favor of Whirlpool and Sears, finding that Oreck had failed to prove any restraint of trade.

This case was then appealed a second time. A unanimous Court of Appeals affirmed the directed verdict. 639 F. 2d 75 (2d Cir. 1980). It acknowledged that a conspiracy can be proved by direct or circumstantial evidence, but its careful review of the record compelled it to conclude that Oreck utterly failed to prove a conspiracy between the defendants. Because the Court found no proof of conspiracy, it considered it unnecessary and inappropriate to review the trial judge's finding that Oreck had failed to prove an unreasonable restraint of trade. *Id.* at 81.

Rehearing *en banc* was denied, and this Petition followed.

Counterstatement of Facts

Whirlpool manufactures a broad range of major household appliances which are sold under the "Whirlpool" name. [PX 634 (E. 258-261), JA. 222-224]. Many of these products are also sold to Sears for sale under its own "Kenmore" label [PX 634 (E. 258-261), JA. 224]. At the times relevant to the complaint, Sears was the owner of less than 5% of Whirlpool's stock, and an officer of Sears sat on the Whirlpool board (JA. 641, 644).

Whirlpool entered the vacuum cleaner business in 1957 and attempted to sell "Whirlpool" brand cleaners through its existing distribution system. It also sold "Kenmore" brand vacuum cleaners to Sears. Sales of "Whirlpool" brand cleaners were unsatisfactory and were discontinued in 1961 [PX 13 (E. 17-18), PX 13A (E. 19-21), JA. 564-565]. Sales to Sears continued. (JA. 565).

In 1963, Whirlpool decided to re-introduce Whirlpool brand vacuum cleaners through a distributor specializing in smaller appliances, known as specialty items, and with a line of higher quality machines which would command higher prices and consequently offer greater profit margins to distributors and dealers [(PX 10 (E. 10-14), PX 13 (E. 17-18), PX 13A (E. 19-21), JA. 569-570, 600-601]. Whirlpool hoped to establish distribution to department stores and other key retail accounts which might ultimately be used to market other small appliances to be added to its line in the future [PX 10 (E. 10-14), PX 45 (E. 48-49), JA. 565, 569-570].

David Oreck was regarded by Whirlpool as a strong merchandiser. Whirlpool felt that he could successfully implement the 1963 re-introduction of Whirlpool brand cleaners and achieve the desired distribution channel, if he gave it his full attention (JA. 601). Whirlpool offered to appoint Mr. Oreck its exclusive national distributor of vacuum cleaners if he would agree to undertake full responsibility for the implementation of

the new distribution concept (JA. 246-248).[3] David Oreck agreed to these terms, and Oreck Corporation ("Oreck") was formed as the vehicle through which he would fulfill his new responsibilities [PX 13 (E. 17-18), PX 13A (E. 19-21)].

On August 7, 1963, Oreck and Whirlpool entered into a contract, pursuant to which Oreck became the exclusive national distributor of Whirlpool brand vacuum cleaners, with full control over the distribution thereof, including sole discretion concerning pricing, advertising and service [PX 3 (E. 1-9), PX 13 (E. 17-18), PX 13A (E. 19-21), JA. 253]. The agreement was for five years, and was renewable yearly thereafter. The agreement also specified that Oreck would purchase certain minimum quantities of product during the initial five years. Certain tooling owned by Sears was necessary to the production of these cleaners. Sears gave permission for the use of that tooling, in return for a tool rental fee (JA. 623, 742-743, 1027, 1033).

Oreck Corporation initially lived up to the terms of its agreement, and David Oreck devoted his full attention to the business. (JA. 262-263, 438-439). However, by the end of 1965, Whirlpool had neither Mr. Oreck's full attention nor the distribution system it desired. In that year, Mr. Oreck acquired an RCA distributorship in New Orleans, a much larger and more profitable business than the Oreck Corporation (JA. 229-230, 440, 442). By his own account, he thereafter gave only approximately one-half of his time and attention to Oreck Corporation. (JA. 440-442).

At about the same time, Oreck began to move away from the new system of distribution which had been Whirlpool's goal and the express agreement of the parties. It instead began to solicit sales to hotels and motels and to distributors and dealers which serviced commercial accounts. (JA. 273-275). By late

[3] The agreed upon method of distribution would be in direct competition with Sears. 563 F. 2d 54, 56.

1965 or early 1966, Oreck's concentration on commercial sales was virtually total. This was upsetting to Whirlpool, not only because Oreck had unilaterally abandoned the method of distribution which had been Whirlpool's only reason for giving Oreck the distributorship in the first place, but also because the Whirlpool cleaners were engineered for domestic, not commercial, use. At this point, Whirlpool began to question whether continuance of the Oreck distributorship was in Whirlpool's interest. (PX 45).

In 1967, Oreck made another unilateral change in the system of distribution. It began to offer vacuum cleaners to customers through direct mail, using a supposed "half price" offer as a come-on (JA. 279-280). Whirlpool thereafter began to receive complaints about Oreck's mail solicitations, both from Oreck's customers and from Oreck's commercial distributors, who had stocked the cleaners and were understandably upset when they found themselves undersold by Oreck itself (JA. 285-287, 492-493).

By April, 1968, Oreck's sales were at their lowest ebb [PX 46 (E. 50-52), JA. 458]. Shipments to Oreck had dropped in every year since 1964, and were then 13,636 units below the minimum quantities specified by the contract [PX 3 (E. 1-9), PX 46 (E. 50-52), JA. 458].[4]

In June, 1968, Oreck was informed of Whirlpool's decision to terminate the agreement. The reason for this decision, as stated to Mr. Oreck, was Oreck's utter refusal to develop the avenue of distribution to key retail accounts which was Whirlpool's sole motive for giving Oreck a distributorship and to which the parties had mutually agreed (JA. 443-446, 573-574, 581-582).

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[4] In that four year period, Whirlpool shipped only 56,364 cleaners and attachments to Oreck [PX 46 (E. 50-52)]. The minimum contract requirement was 70,000 [PX 3 (E. 1-9)].

David Oreck reacted to this notice by complaining that he would lose all of his investment if terminated, threatening legal action and requesting an extension through 1971, to permit him to recover his investment (JA. 316-317, 653). Whirlpool acquiesced in this request and the 1963 agreement was replaced by one dated August 1, 1968, which provided that it would continue until December 31, 1971, *"at which time this Agreement shall expire"* [PX 44A (E. 40-47)]. There was no provision for renewal.

After obtaining this extension, Oreck intensified its direct mail program,[5] continuing to employ misrepresentation and misstatement as its selling tools. It used Whirlpool's name in its mailers, and even implied that Whirlpool was a partner in its deceptive scheme. For example, millions of mailers distributed in 1968 and thereafter falsely implied that Oreck was passing on bargain prices from Whirlpool by stating that the so-called "half price" offer was made "through the cooperation of the Whirlpool Corporation" [PX 617 (E. 215-218), DX EE (E. 528-535)]. In addition, each mailer throughout this period represented that the recipient, because a member of a purported "special" group, such as "engineers", "business executives", or even a "consumer test group", could receive a vacuum cleaner for one-half of the price paid by leading hotels [PX 617 (E. 215-218), PX 622 (E. 225), DX EE (E. 528-535)].[6] As David Oreck himself admitted, however, these representations were false. (JA. 481, 485-486, 490-492). There were no "half-prices" or special prices and there were no "special groups", only names on a mailing list.

Other deceptive gimmicks employed by Oreck in its mailings included a purported two-week "expiration" of the offer,

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[5] Oreck sent eight to ten identical solicitations per year to persons whose names happened to appear on the various mailing lists. (JA. 480).

[6] Oreck employs the same tactics even today, in spite of years of such complaints [DX U (E. 520-525), JA. 479].

claimed non-transferability thereof and an alleged restriction of the offeree to the purchase of a single unit. David Oreck also conceded the falsity of these representations. (JA. 487-490).

Whirlpool and Oreck received numerous complaints from and on behalf of consumers concerning these mailers. Indeed, one such complaint was received by Whirlpool from the Better Business Bureau in 1971, when Whirlpool's Chairman of the Board was serving as President of the Bureau (JA. 493, 496).[7]

Early in 1971, Whirlpool received a letter from Oreck stating that it anticipated a continuance of their business relationship beyond December 31, 1971, the contract termination date to which Oreck and Whirlpool had previously agreed. Whirlpool replied that it intended to adhere to the termination date of the contract [PX 96 (E. 68)]. Oreck thereafter began to order machines in unprecedented amounts which were far beyond its needs (JA. 465-466). Whirlpool questioned these orders, but Oreck insisted on this production (JA. 466), and Whirlpool manufactured every machine Oreck ordered. However, Whirlpool informed Mr. Oreck that Oreck Corporation would have to take and pay for all machines which it ordered by December 31 (JA. 468-470).

But Oreck failed to take or pay for these machines prior to December 31. As of that date, Whirlpool had over $900,000 worth of inventory (JA. 461, 519-521, 580)[8], and Oreck owed Whirlpool another $220,000 for machines shipped but not paid for [PX 122 (E. 74-76), JA. 593-594]. Oreck steadfastly refused to pay the $220,000 and Whirlpool was finally com-

[7] Whirlpool also received a complaint from a retired director of Sears, in 1971, who received an Oreck mailer as a member of a "consumer test group". He noted that he was not a member of any such group and opined that the mailers hurt Whirlpool's image and looked like a "come on" (JA. 1038, First trial PX 60, A. 830-831).

[8] Oreck had Whirlpool machines in its own inventory until 1973 (JA. 475).

pelled to institute a collection action, obtain a judgment, defend the judgment on appeal and garnish Oreck's bank account in order to satisfy this debt (JA. 415-418, 474).

Nevertheless, in 1972 Oreck demanded that Whirlpool sell the $900,000 inventory to it despite the expiration of the contract and despite Oreck's continued refusal to pay for $220,000 worth of the machines it had already received (JA. 461-463, 594). Whirlpool refused, and subsequently liquidated the inventory to third parties at a loss [PX 301 (E. 140-142), JA. 419-420]. Oreck thereafter purchased a large number of these machines from those third parties, at a lower price than it paid Whirlpool for the same models (JA. 419-420, 474-475).

Oreck did not make a significant attempt to find a source to replace Whirlpool until 1972 (JA. 426-427, 431-433, 446-448). It then arranged to purchase a power attachment from Mastercraft, Inc. to replace the one previously supplied by Whirlpool (JA. 427, 429-431). Also, early in that year, it contacted the McDonald Electric Co., a German manufacturer, which agreed to supply Oreck with an upright machine similar to the model it had been purchasing from Whirlpool (JA. 446-448). McDonald, which had never before marketed in the U.S. (JA. 450), began to ship products to Oreck shortly thereafter. Oreck sold these machines under its own name [DX U (E. 520-525), DX 00 (E. 536-542), JA. 431-433].[9]

Oreck has had ever-increasing success with the Oreck brand machine [PX 881 (E. 501)]. Its sales literature touts its cleaners as the "most effective" the consumer has ever used, and they are guaranteed twice as long as its "previous models". Oreck now also describes itself as the "world's largest seller of top-fill uprights" [(DX U (E. 520-525), DX 00 (E. 536-542)].

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[9] Bissell, a domestic company, later became Oreck's source for the upright machines (JA. 450).

Both before and after the expiration of the Oreck-Whirlpool agreement the vacuum cleaner industry in the United States included numerous manufacturers and sellers. One company, Hoover, sells about one of every three vacuum cleaners in the United States [PX 712A (E. 289)], while Sears has never enjoyed as much as 15% of the market [PX 717A (E. 334)]. In Oreck's best year as a Whirlpool distributor it achieved only 1% of this market [PX 717A (E. 334), PX 880 (E. 500), 579 F. 2d at 128, fn. 3]. In each of its previous years, it sold substantially less than 1% [PX 717A (E. 334), PX 840 (E. 499)].

The total of vacuum cleaner sales in the United States market increased from 4,208,000 units in 1963 to 8,175,000 units in 1972, and to 8,633,000 units in 1978 [PX 728A (E. 462)]. The number of competitors in the market has remained relatively constant, with manufacturers such as Oreck's German source replacing others whose activities were discontinued [PX 717A (E. 337), PX 720A (E. 442), A. 446-448]. As the *en banc* Second Circuit previously found, "... there was at all relevant times, an abundance of vacuum cleaners available in the marketplace which were reasonably interchangeable with those manufactured by Whirlpool." 579 F. 2d at 128, fn. 3.

Plaintiff introduced no evidence that defendants ever discussed the Oreck franchise, much less its extension or termination. There is no evidence that Sears ever considered Oreck a competitive threat, or that it was even aware of Oreck's sales performance, no evidence that Sears ever complained to Whirlpool about Oreck's prices, and not even any evidence that Oreck was in fact a price cutter. "Indeed, despite Oreck's claim that it sold vacuum cleaners at one-half the retail price, there was no evidence that it ever undercut Sears on the price of vacuum cleaners." 639 F. 2d at 78.

SUMMARY OF ARGUMENT

Plaintiff has twice failed to prove that defendants' alleged actions had any anticompetitive impact in the vacuum cleaner market. It alleges no more than a supposed vertical restraint on trade, and its present demand to be relieved of its burden of proving competitive impact is completely contrary to the decisions of this Court. Plaintiff's admitted inability to show any harm to competition mandates denial of its petition.

Plaintiff likewise failed to prove a conspiracy. The Court of Appeals measured plaintiff's proof in accordance with the dictates of this Court's decisions, and plaintiff's position is thus limited to a request that this Court recompute the evidence in the record. Accordingly, review by this Court is not merited.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Oreck's Inability to Muster Proof Does Not Excuse Its Obligation to Prove That Its Termination Had an Adverse Effect on Competition

Oreck has had two opportunities to prove that the expiration of its Whirlpool distributorship had an adverse effect on competition. It has failed in both attempts. Indeed, its counsel frankly admitted at the close of its evidence at the second trial that the alleged Whirlpool-Sears conspiracy had *no* effect on the vacuum cleaner industry as a whole (JA. 1136), the defendants could not do anything about the pricing of other manufacturers (JA. 1106-1107), Sears did not have the power to maintain its prices at artificially high levels in the overall market even if Oreck had been eliminated (JA. 1095), and no consumer found it any more difficult to obtain a vacuum cleaner after the Oreck agreement expired (JA. 1097). In fact, the evidence in this case shows that Oreck was easily able to obtain a new source of supply and that "... there was, at all relevant

times, an abundance of vacuum cleaners available in the marketplace which were reasonably interchangeable with those manufactured by Whirlpool." 579 F. 2d at 128, fn. 3.

Reduced to its basics, Oreck's position is that, despite the demonstrated and admitted lack of anti-competitive effect, this Court should nevertheless *presume* that such an effect existed. In other words, Oreck wants this Court to apply what amounts to a *per se* rule in order to relieve it of a burden of proof which it has twice been unable to meet. Oreck contends that defendants should be required to prove that a "benefit" to competition resulted from the expiration of its distributorship even though the expiration had no adverse effect upon competition of any description at any level.

Contrary to Oreck's position, this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36 (1977), does not countenance application of a *"per se"* rule to excuse Oreck from proving that the alleged vertical restraint had adverse market impact. In fact, this Court there expressly rejected *per se* treatment for vertical restraints, unless a *per se* analysis could be justified by "demonstrable economic effect". 433 U. S. at 58-59. Here, however, Oreck failed to prove *any* effect on competition. Hence *per se* treatment would be improper and a rule of reason analysis required a directed verdict.

Cases following *Continental T.V.*, including *National Society of Professional Engineers* v. *U. S.*, 435 U. S. 679 (1978), have uniformly reaffirmed the proposition that plaintiff bears the initial burden of proving that competition has been adversely affected. No defendant is required to prove a procompetitive benefit absent evidence of any anticompetitive impact. *See also, Lektro-Vend Corp.* v. *Vendo Co.*, 1981-2 Trade Cas. ¶ 64,258 (7th Cir. 1981) and cases cited therein, and *Cowley* v. *Braden Industries, Inc.*, 613 F. 2d 751 (9th Cir. 1980), *cert. denied*, 446 U. S. 965 (1980) and cases cited therein.

Simply put, Oreck's "cart before the horse" theory contravenes the most basic tenets of antitrust law, which make it clear that the law does not exist to right every perceived business wrong. It has long been held that "the antitrust laws ... were enacted for 'the protection of *competition*, not *competitors* ...'." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488 (1977) (emphasis in original). Oreck's insistence that it be protected in its position as a Whirlpool distributor, regardless of the fact that the expiration of the agreement had *no* adverse effect on competition whatsoever, is thus without foundation in the law. *See, Lektro-Vend Corp.* v. *Vendo Co., supra,* at p. 74,085.

Apparently realizing that defendants may not be "presumed guilty until proven innocent", Oreck argues that it did, in fact, demonstrate that the expiration of its distributorship resulted in a "detriment" to competition. In support of this proposition, it claims that "intrabrand competition" was eliminated, and further claims that its "price competition" was removed from the market. These "competitive effects" are, however, simply figments of Oreck's imagination.

There was never any intrabrand competition between Sears and Oreck. No one but Oreck distributed "Whirlpool" vacuum cleaners (639 F. 2d at 78). Thus, the only result of Oreck's loss of this distributorship was that Whirlpool's name no longer appeared on vacuum cleaners. And, as the Second Circuit found, there were, at all times, "... an abundance of vacuum cleaners available in the marketplace which were reasonably interchangeable with those manufactured by Whirlpool." 579 F. 2d at 128, fn. 3. Indeed, Oreck was back in the market shortly thereafter, with a new brand, "Oreck", to replace Whirlpool, with a new supplier and a new machine guaranteed for a longer period than its previous models [JA. 427-431, DX U (E. 520-525), DX 00 (E. 536-542)]. Thus, no "detriment to competition" occurred when Oreck's distribution of Whirlpool brand cleaners ended.

Oreck's "price competition" is also a myth. As the Second Circuit found, after an exhaustive review of the record on this point, "there was no evidence that [Oreck] ever undercut Sears on the price of vacuum cleaners." 639 F. 2d at 78. Indeed, the *en banc* Second Circuit found "it is undisputed that, at all times relevant, Sears was selling its 'Kenmore' vacuum cleaners at prices *below* those charged by Oreck for comparable 'Whirlpool' models." 579 F. 2d at 130 (emphasis in original). Moreover, numerous competitors in the market sold machines at prices below those of Oreck [PX 712 (E. 271)], and Oreck offered no evidence that its goods were "price-competitive" with Sears or any other machines.

Manifestly, then, "competition" requires no protection in this case because there was no effect on competition. To nevertheless uphold Oreck's claim under the antitrust laws would be to overrule *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* and open the door to application of antitrust remedies to "wrongs" which those laws were never intended to right. For these reasons alone, the petition should be denied.

The Second Circuit Adhered to Well Established Legal Principles, and Correctly Concluded that Oreck Failed to Prove a Conspiracy.

When it affirmed the verdict in favor of defendants, the Second Circuit did not enunciate any new legal principles, overrule any prior decisions or generate any conflict between the Circuits. Among other things, the court specifically adhered to this Court's holding in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U. S. 700, 704 (1969) that a conspiracy may be proved by circumstantial evidence, including the acts and conduct of the alleged conspirators. But, after careful review of the record, the court was compelled to conclude that Oreck did not sustain its burden of proving a conspiracy between Whirlpool and Sears. 639 F. 2d 75, 81.

This holding is especially unremarkable in view of Oreck's express admission that there was no conspiracy to drive it out of the vacuum cleaner business (JA. 1093-1094).

The gist of Oreck's Petition, then, is its disagreement with the Second Circuit's evaluation of the record. Oreck merely asks this Court to "second guess" the Court of Appeals on factual issues. Such a decision by this Court would neither have value as precedent nor be instructive to the lower federal courts in future cases involving different facts.

That Oreck merely disagrees with the Second Circuit's view of the facts is demonstrated by its claim that the court ignored evidence of Whirlpool's allegedly economically irrational behavior. This is incorrect. The court examined Oreck's proffered evidence on this point and found it deficient. 639 F. 2d 75, 79. It held it was not irrational to refuse to sell Oreck more inventory after December, 1971, when Oreck was already indebted to Whirlpool in an amount in excess of $220,000, was refusing to pay and forcing Whirlpool to sue to collect.[10]

Oreck's assertion that Whirlpool acted irrationally in terminating Oreck because its volume had increased ninefold in four years is misleading and ignores other evidence in the record. Oreck has chosen to compare its purchases in 1967, its worst year, with its purchases in 1971, when it was stocking up in contemplation of the expiration of its distributorship agreement. The undisputed evidence is that Oreck's purchases in that year were so far in excess of its actual needs that Oreck had

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[10] Oreck's record citations on this point are misleading. It refers to Oreck's account balance in November, 1971 (JA. 414-415), not to its balance on December 31, 1971. Oreck's offer to buy did not come until *January, 1972*, at which time it was refusing to pay a debt to Whirlpool of over $220,000. (JA. 461-463, 594)

Whirlpool vacuum cleaners in stock two years after its Whirlpool distributorship came to an end (JA. 475). Obviously, such "playing with figures" is meaningless.[11]

Although Oreck accuses the Court of Appeals of compartmentalizing the evidence, it is actually Oreck which compartmentalizes the evidence. Its Petition ignores Oreck's admitted refusal to establish the marketing system which had been Whirlpool's only reason for granting Oreck a distributorship in the first place. It ignores the fact that the distributorship contract expired by its agreed term. It ignores the abundant evidence of Oreck's shoddy, false and misleading advertising which either directly or indirectly employed the Whirlpool name. And, it ignores the complaints from consumers and the Better Business Bureau. Unfortunately for Oreck, the Court of Appeals refused to ignore this telling evidence.

Oreck also accuses the Court of Appeals of ignoring alleged evidence of anti-competitive motive.[12] For instance, Oreck would have this Court believe that the record supports an inference that Oreck was a competitive threat to Sears with regard to price and Sears catalog sales. The record supports neither inference. As to price, Oreck judicially admitted by allegation in its original complaint, and the Second Circuit found on the first appeal, that Sears at all times charged lower prices than Oreck for "Kenmore" vacuum cleaner models which Oreck claimed were comparable to its "Whirlpool" machines. 579 F. 2d at 130; Amended Complaint, ¶ 41 (E.

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[11] Even assuming, *arguendo*, that Oreck proved economically irrational conduct by Whirlpool, that alone would not prove a conspiracy with Sears. *See, e.g., Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 114 (3d Cir. 1980), *cert. denied*, ____ U. S. ____ (1981), cited by Oreck at page 22 of its Petition. No additional proof exists.

[12] Of course "motive" by itself is not enough to support an inference of conspiracy. *See, e.g., Dart Drug Corp.* v. *Parke, Davis & Co.*, 344 F. 2d 173, 186 (D. C. Cir. 1965).

24). On the second appeal, the court specifically found that "there was no evidence that [Oreck] ever undercut Sears on the price of vacuum cleaners." 639 F. 2d 75, 78. Oreck's assertion that Sears complained to Whirlpool about Oreck's pricing therefore makes no sense, but, in any event, there is no evidence of any such complaint. Clearly, there was no evidence of any price motivation or even concern by Sears.

Equally misleading and incorrect is Oreck's implication that Sears was concerned about Oreck's mail order sales as a threat to Sears catalog sales. Oreck claims it was "invading the historic Sears' mail order market." (Petition p. 11). This argument rests on the implicit assumption, totally unsupported in the record and absolutely false, that the Sears catalog is primarily a mail order business. As a matter of fact the undisputed evidence is that only a small part of Sears' catalog sales are made by mail order and about 95 percent of Sears' catalog sales are made by telephone and in person at its retail stores, at its catalog, retail and telephone sales offices, and through its authorized catalog sales merchants [PX 633 (E. 254-257), JA. 255, 716,717, 754]. There is simply no basis for any inference that there was something special about Oreck's sales methods to make Sears select Oreck from all other sellers in the market as the particular competitive threat that it most feared.

For the same reason, one must reject Oreck's claim that an increase in its mail order sales caused a decrease in Sears "mail order" sales. As shown above, Oreck has erroneously equated mail order sales with catalog sales. In fact, Oreck presented no evidence as to whether the mail order portion of Sears' catalog sales was going up or down or remaining constant. Moreover, there is no evidence that Oreck's sales had any special relationship to Sears' sales out of all the brands on the market, nor that other sellers' fortunes were not also fluctuating at the same time.

Oreck's repeated references to Sears' supposed "leverage" over Whirlpool do not advance its case. The Second Circuit correctly recognized that Oreck could not sustain its burden of

proof by proving a close relationship between Sears and Whirlpool or that Sears had "economic muscle." It was necessary to prove that Sears *used* that muscle. 639 F. 2d at 79. As shown above and as the Court of Appeals found, there was no such evidence, direct or circumstantial. Indeed, to infer conspiracy merely because of the close relationship between Sears and Whirlpool would be "sheer speculation". *Id.* at 80.

Clearly, Oreck's position that it proved a conspiracy rests upon an inaccurate and compartmentalized view of the record. When the record is viewed as a whole, including Oreck's express admission that there was no conspiracy to drive it out of the vacuum cleaner business and that defendants could not have done so even if they had tried, the Court of Appeals' conclusion that there was insufficient evidence of conspiracy was both correct and unremarkable. Review by this Court is not warranted.

CONCLUSION

For each and all of the foregoing reasons, this Court should decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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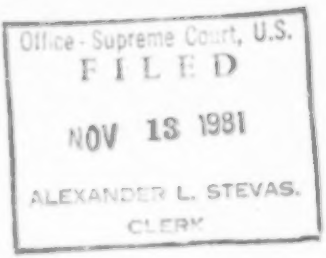
Petitioner's Reply Brief

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981



ORECK CORPORATION, Petitioner	)	
WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., Respondents	)	No. 81-584

REPLY BRIEF OF ORECK CORPORATION IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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November 13, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORECK CORPORATION, Petitioner	)	
WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., Respondents	)	No. 81-584

REPLY BRIEF OF ORECK CORPORATION IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

Petitioner Oreck Corporation ("Oreck") submits this brief in reply to the Briefs in Opposition filed by respondents Sears, Roebuck & Co. ("Sears") and Whirlpool Corporation ("Whirlpool").

INTRODUCTORY STATEMENT

Respondents' briefs highlight the need for plenary consideration of the two important antitrust issues raised by Oreck's Petition: (1) Did the court of appeals err, as a matter of law, in overturning the district court's finding that there was sufficient evidence of conspiracy to submit to the jury? (2) Is it necessary for an antitrust plaintiff to prove actual market-wide competitive harm where, as here, the evidence establishes an anticompetitive vertical termination agreement with no countervailing benefit to interbrand competition?

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS DECISION WHICH IMPROPERLY INCREASES THE QUANTUM OF ANTITRUST CONSPIRACY PROOF REQUIRED TO REACH A JURY.

Seeking to belittle the significance of this case, Whirlpool argues that Oreck

"merely asks this Court to second guess the Court of Appeals on factual issues" and it "merely disagrees with the Second Circuit's view of the facts." (Whirlpool Brief at 15). This is flatly incorrect. The question presented by the Petition is not how the Second Circuit viewed the facts but whether it erred as a matter of law in taking the conspiracy issue from the jury. As we have shown, the court in doing so not only overturned the trial judge's determination that there was "no problem" in submitting the issue to the jury (App. 20A), but ignored the mandate of this Court's leading cases an proof of antitrust conspiracy, e.g., Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, (1962); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Norfolk Monument

Company v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969). (See Petition, at pp. 16-20.) The Second Circuit's error, therefore, is one of law, not of mere factual assessment, and review by this Court is required in order to arrest a lower court trend that mistakenly increases the quantum of antitrust conspiracy proof required to reach a jury.

The court of appeals' departure from settled legal principles is manifested by its refusal to permit the jury to decide the factual issues notwithstanding proof of anticompetitive motive, communications between the defendants, and Whirlpool's economically irrational act of terminating Oreck. Respondents' attempt to press their side of

these factual controversies only highlights the error of the court of appeals.[1/]

1. Anticompetitive Motive.

The Whirlpool and Sears briefs argue that Whirlpool knew that Oreck was in direct competition with Sears from the moment it became a Whirlpool distributor and, therefore, there was no anticompetitive motive for terminating Oreck. (Whirlpool Brief at p. 5 n.13; Sears Brief at p.3)

To the contrary, Whirlpool's Stroop Report expressly provided that "Sears becomes very unhappy if RCA WHIRLPOOL product is

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1/ Whirlpool misleads this Court when it implies (Whirlpool Brief, p. 15) that Oreck's counsel admitted that there was no conspiracy to drive plaintiff out of business. The record is unmistakable that Oreck consistently argued that there was a conspiracy to deprive it of an accepted, name brand product which was essential for Oreck's aggressive, mail order marketing strategy.

retailed for less than the Sears product ..." (PX 160, (E 79 at E 93)), and, at the time of his appointment, Oreck was instructed by Whirlpool Group Vice-President Sparks to follow the Stroop blueprint (JA 248-250). Furthermore, contemporaneous Whirlpool documents condition the Oreck distributorship on sales of "high list, high profit" cleaners only to department stores and "carefully selected accounts" (E 13A at E 21); and Sparks repeatedly testified that Oreck's units were intended by Whirlpool to be sold at "a high price." (e.g., JA 574). Thus, from the onset, Oreck's distributorship was designed to insulate Sears from Oreck's competition, and Oreck was terminated when it deviated from this plan.

Whirlpool argues further (p. 10) that the Oreck distributorship, even in operation, was never a "competitive threat"

to Sears. Yet, contrary to Whirlpool's assertions, Oreck's price was significantly below the average price of competitive Sears cleaners.[2/] Finally, the jury could have found that Oreck's competition had an effect on Sears since, as Oreck's mail order sales rose dramatically, Sears' mail order sales of upright units plunged. (PX 825 (E 498)).[3/]

2/ It is undisputed that the lower priced Sears cleaner was inferior to the Oreck product (JA 1021-29) and the record demonstrates that the higher quality Oreck cleaner competed with the entire line of Sears models, including those that were more expensive than the Oreck cleaner. (JA 751-52; PX 884 (E 504); PX 713 (E 300 at E 306)).

3/ Sears (Brief, p. 9) and Whirlpool (Brief, p. 17) assert that catalogue and mail order sales are not the same. Although this is yet another jury question, the record demonstrates that Sears characterized its catalogue sales as "mail order" (PX 718A (E 379 at E 410); PX 712A (E 262 at E 297)); Sears' own marketing data shows that one half to three quarters of its catalogue sales were

[Footnote 3/ continued on following page.]

2. Communications Between Defendants.

Respondents' characterizations of the communications between Sears and Whirlpool are inconsistent with the trial court's view of the evidence and are clearly wrong. Both respondents assert that there were no communications between Sears and Whirlpool on the subject of Oreck's distributorship. Yet, a Whirlpool group vice-president testified that he was aware of such communications (JA 605-06), and a Whirlpool product manager told Oreck about numerous other conversations. (JA 1064, 1069, 1078).

Furthermore, it is false to claim, as does Sears, that the Sears-Whirlpool communications concerned Oreck's advertising

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termed "mail order" (See, PX 717A (E 332 at E 345, E 349); PX 712A (E 262 at E 299)); and, for this reason, Sears' catalogue and Oreck's mail order sales clearly were in direct competition.

practices and that the termination of Oreck was for this reason alone. This, plainly, is a fact question and one raising hotly contented issues of motive and intent. In fact, the Sears-Whirlpool position on appeal is contrary to Whirlpool's interrogatory answers, which never cited Oreck's advertising as a reason for terminating the distributorship (JA 653), as well as to the admissions of Whirlpool's Group Vice-President Sparks that no aspect of Oreck's advertising or public relations was the cause of Oreck's termination. (JA 582-83).

3. Whirlpool's Economically Irrational Conduct.

Whirlpool asserts that its termination of Oreck was a sound business decision. Yet, as demonstrated previously (Petition, p. 22, n.1), the Oreck distributorship was of

such great commercial benefit to Whirlpool that the Whirlpool product manager for the Oreck account urged that it be continued. (JA 632-33). Certainly this raises a classic question of motive that should have been submitted to the jury.[4/]

In sum, the briefs of Sears and Whirlpool merely highlight (i) the factual issues relating to anticompetitive motive, defendants' communications about Oreck, and Whirlpool's economically irrational behavior in terminating the distributorship; (ii) the error of the court of appeals in undertaking to resolve these fact issues and finding,

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4/ Whirlpool asserts that it was not economically irrational to refuse to sell Oreck its inventory of cleaners after termination because Oreck owed it $220,000. However, this debt did not arise until after Oreck was terminated and after Whirlpool's decision not to sell Oreck any more cleaners. (JA 590-91; PX 102).

contrary to the trial court, that there was insufficient evidence to go to the jury; and (iii) the court of appeals' creation of higher barriers to proof of antitrust conspiracy. If allowed to stand, the decision below will accelerate an ongoing trend of lower court decisions that erroneously increase the quantum of antitrust conspiracy proof required to reach a jury. (Petition at p. 18).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT "MARKET EFFECT" ISSUE WHERE INTRABRAND COMPETITION HAS BEEN ELIMINATED AND THERE IS NO CLAIM OF INTERBRAND BENEFIT.

Only Whirlpool even purports to deal with the second question presented by the Petition, namely, whether a customer-supplier termination agreement, with not even a claim of redeeming competitive benefit, must nevertheless be upheld under the rule of reason

absent proof of actual market-wide competitive harm. (See Petition at p. 4.) In fact, Whirlpool ignores this question by simply assuming that the law requires a showing of actual market-wide effect, and then asserting that since Oreck failed to "prove that the expiration of its Whirlpool distributorship had an adverse effect on competition," there was no antitrust violation. (Whirlpool Brief at pp. 11-12.) Thus, Whirlpool neatly sidesteps the important market effect issue.

It is important to recognize that Oreck does not claim that a vertical termination agreement is presumptively or per se unlawful. Instead, it is Oreck's position that such an agreement, although by its nature anticompetitive, is subject to the rule of reason; that rule of reason analysis

permits defendants to demonstrate countervailing competitive benefits; that here the Sears-Whirlpool termination agreement has been conceded to be without any redeeming benefit to competition; and that, accordingly, it is a naked restraint of trade and unlawful, whether or not an actual effect on overall vacuum cleaner supply or prices could be shown. As demonstrated in the Petition, this view of the law comports fully with the established antitrust precedents of this Court. (See Petition at pp. 29-34.)

Contrary to Whirlpool's reading of the case, a requirement of industry-wide effect would be at odds with the holding and logic of Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). Continental T.V. countenances intrabrand restraints, but only where countervailing interbrand benefits are achieved by virtue of distribution efficiences.

Absent a showing of such efficiencies, the total elimination of intrabrand competition by agreement cannot be condoned. Furthermore, small market share does not, as respondents would have it, end the antitrust inquiry. In Continental T.V. defendant Sylvania had a market share in plaintiff's territory of only 2.5%.

As Continental T.V. implies, there is no requirement in a setting such as this to prove industry-wide effect. Indeed, if respondents' arguments were accepted, the intentional destruction of a small but growing firm in a concentrated market could never be an antitrust violation under the rule of reason, a proposition which is wrong as a matter of law. Columbia Metal Culvert Co., Inc. v. Kaiser Alum. and Chem. Corp., 597 F.2d 20 (3rd Cir. 1978), cert. denied, 439 U.S. 876 (1978). Furthermore, a

Sherman Act violation is not precluded in other settings involving the potential foreclosure of a small competitor, e.g. territorial and product restrictions in a salesman's contract, Bravman v. Bassett Furn. Industries, Inc., 552 F.2d 90 (5th Cir.) cert. denied, 434 U.S. 823 (1977); and restrictive lease covenants, Friedman v. Thorofare Markets, Inc., 587 F.2d 127 (3rd Cir. 1978). Similarly, in cases of per se violations, this Court does not require proof of adverse industry-wide effect. See, Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), and Petition at pp. 29-31.

As these cases imply, it is the anticompetitive nature of the restraint, not the magnitude of actual market effect, that determines its "reasonableness." Continental T.V. requires a balancing of intrabrand and interbrand effects in a

vertical setting such as the one presented in this case. Where, however, a vertical termination agreement eliminates intrabrand competition, without pretense of benefit to interbrand competition, and where there is no legitimate main purpose to which the restraint is ancillary, United States v. Addyston Pipe & Steel Co., 85 F.271, 282 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), then there is nothing to balance and the agreement is an unlawful, naked restraint of trade.

Review by this Court is necessary to resolve the important market effect issue in this setting, and to make clear that proof of industy-wide effect is unnecessary where a vertical termination agreement eliminates intrabrand competition without any redeeming benefit to interbrand competition.

CONCLUSION

This case raises important issues of proof of antitrust conspiracy and violation under the rule of reason. Certiorari should be granted to correct these errors and to clarify two important areas of antitrust law.

Respectfully submitted,

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November 13, 1981